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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1476

J. BRIAN GAFFNEY, *Appellant*

v.

THEODORE R. CUMMINGS, ET AL.,
NANCY ARONIE, ET AL., AND
THOMAS J. MESKILL, Governor of the State of
Connecticut, ET AL., *Appellees*

BRIEF FOR APPELLANT

Appeal From the United States District Court for the District of Connecticut

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OPINION BELOW

The opinion delivered in the District Court by Memorandum of Decision dated and filed March 30, 1972 is reported at 341 F.Supp. 139, and appears in the Jurisdictional Statement at pages 1a-14a.

JURISDICTION

The jurisdiction of the Supreme Court of the United States to review this case by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). Notice of this appeal was filed with the Clerk, United States District Court, District of Connecticut, on April 13, 1972.

Probable jurisdiction of the appeal was noted on October 10, 1972.

STATE LAW INVOLVED

This appeal involves the validity of a plan of reapportionment for the Connecticut General Assembly, prepared and promulgated under the state constitution by a bipartisan board, submitted to the Secretary of the State, and published by the Secretary so as to have the full force of law. Conn. Const. Art. III, § 6(e), text set forth in Jurisdictional Statement, Appendix D, p. 16a. The plan and its contained maps appear of record as Plaintiffs' Exhibit 1, Trial Transcript, p. 6, on file in this Court. They are not readily susceptible of reprinting and the text is not materially pertinent to the salient issues on this appeal.

QUESTIONS PRESENTED*

1. Whether the substantial equality principle of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), is satisfied by a state legislative apportionment, based on available census units

* The abstention issue, reserved as an issue in the listing of questions presented in the Jurisdictional Statement, p. 7, is deemed to have been so overridden by subsequent events that it is not now being pressed. The arguments thereto are presented in the Jurisdictional Statement, pp. 55 to 57. As noted in the section, *infra*, this Brief on "Events Since District Court Judgment", a lower state court and the state supreme court have validated the State Plan for use in the 1972 election, and the reserved jurisdiction of the state supreme court now that that court has acted on the plan is so dependent on resolution of federal issues here that invocation of abstention now would perpetuate uncertainty and confusion and lead to further litigation and appeals.

averaging 1,100 people each, in which the maximum population deviation from ideal is 787 persons (0.93 percent) for the 36 senate districts and 789 persons (3.93 percent) for the 151 assembly districts, and in which the average population deviations for the senate and assembly districts respectively are 379 persons (0.45 percent) and 399 persons (1.9 percent).

2. Whether a substantial federal issue is raised by the number of town line cuts reflected in the Apportionment Board's plan, in view of the conceded necessity to cut town lines in order to comply with the equal population principle of the Fourteenth Amendment.

3. Whether the bipartisan Board's further policy of seeking political fairness and avoiding districts which could again produce a minority legislature, a policy which entailed consultation of past election data and insignificantly increased the number of town cuts, violates the Equal Protection Clause of the Fourteenth Amendment absent proof either that such a policy increased population deviations or that such policy caused invidious discrimination by minimizing or cancelling out the voting strength of racial or political elements of the voting population.

STATEMENT

This appeal concerns the constitutionality of a plan of apportionment for the Connecticut General Assembly, filed with the Secretary of the State on September 30, 1971, and thereafter published with the force of law by the Secretary in December of 1971. The plan was devised by a bipartisan, three-man Apportionment Board. The Board is the back-up mechanism under the Connecticut Constitution for antecedent reapportioning stages. The constitution, as applied to the actual process in Connecticut in 1971, provided an initial opportunity for the legislature to reapportion itself by April 1, 1971. When the legislators failed to agree on a plan, a bipartisan, eight-man commission was appointed (the party leaders in the legislature each appointing one-half) to devise a reapportionment plan by July 1, 1971.

The commission deadlocked and thereupon a three-man bipartisan board was constituted under the state constitution. The Democratic speaker and the Republican Minority leader in the lower house each designated a judge of the superior court as a member of the Board, the speaker designating Judge Leo Parskey and the minority leader designating Judge George A. Saden. The two persons so selected were empowered under the constitution to select an elector of the state as a third member; in this instance a justice of the state supreme court was selected. Conn. Const. Art. III, §§ 1, 3-6. The method of selection agreed on was for Judge Parskey to prepare a list of names acceptable to him, and for Judge Saden to select from that list; on this basis Justice John R. Thim was selected. Saden Dep., Single App. pp. 21-22.

This Board of three judges discharged its function and filed its plan on September 30, 1971. One member of the Board filed a short dissenting statement. The plan describes legislative districts in terms of 1970 census maps and figures. Final House and Survey Maps found at Trial Trans., Single App., pp. 138-39.

As noted in the District Court opinion below, the smallest units of census data available to the Apportionment Board were block groups and enumeration districts. The average population of the former was between 1,200 and 1,250 people; of the latter, between 750 and 800 people. Of the total number of these 2,746 census units of Connecticut, 80% were block groups, and the average population of the 2,746 census units was 1,100 people.

The ideal assembly district would contain 20,081 population, and the ideal senate district would contain 84,228. The Board devised 151 single-member lower-house districts and 36 single-member senate districts.

The populations of the assembly districts created by the plan have a maximum deviation from average of +3.93%

and −3.9%, i.e., a deviation of 789 people and 784 people respectively. The average deviation from perfect equality for all assembly districts is 1.9%, and the median deviation is 1.8%.

The populations of the senate districts created by the plan have a maximum deviation from average of +0.88% and −0.93%, i.e., a deviation of 745 people and 787 people respectively. The average deviation of all senate districts is 0.45% and the median deviation is 0.47%.

Of the total of 169 towns in Connecticut, 47 were cut under the plan for assembly districts; 23 for senate districts.

In devising the plan the Apportionment Board gave principal weight to numerical equality in district population and some weight to two additional considerations: an attempt to minimize the cutting of town lines, and an attempt to avoid political unfairness in the sense of creating districts under which a party with a minority of the statewide legislative vote could capture a majority of votes in one or both houses of the legislature. This policy, which has been sometimes referred to as a political balance principle and which might more appropriately be described as a principle of safeguarding opportunity for effective political action by all voters, necessarily involved a knowledge of past election data.

On November 12, 1971, a suit was filed in state court for correction of alleged minor clerical errors or omissions in the plan, and for promulgation of the plan as constitutional for statewide legislative elections in November, 1972. Regarding the alleged omissions there was one instance of apparent noncontiguity and there were three instances of "dropped" population areas caused by a clerical error in describing the area of districts in census terms. *Miller* v. *Schaffer Secretary of the State,* No. 173606, Super. Ct., Hartford County, November 12, 1971, defendants' Exhibits B and C, Trial Trans., Single App., pp. 266-67.

One week after the state court suit was filed, the plaintiffs, on November 18, 1971, commenced this federal suit for a declaration that the reapportionment plan was unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment, bringing suit under 42 U.S.C. §§ 1983, 1988 and 28 U.S.C. §§ 1343(3) and 1343(4). In their complaint they claimed the Board had "erroneously applied the one man-one vote doctrine of the Fourteenth Amendment to the United States Constitution to achieve smaller divisions from population equality for the assembly districts than was required by the Fourteenth Amendment, thereby cutting an excessive number of town lines. *Cummings* v. *Meskill*, Complaint, Point 11, Single App., p. 8. They also alleged that with the same percentage deviation as in the plan, fewer towns could be cut. They also claimed that the plan was a political gerrymander in favor of the Republican party, and that some districts lacked compactness.

The defendant, J. Brian Gaffney, intervened in support of the Board's plan to insure adversity because the Attorney General, the state official charged with defense of the plan, was of the same political party as the plaintiffs. He claimed that the Board's plan is constitutional, and that minor inadvertent error and omission and lack of contiguity could easily be corrected, preferably in the pending state court suit. He also urged that the District Court should abstain because of the pending state court action.

The state court suit survived a demurrer by the Attorney General in a ruling on January 17, 1972, thereby expressing the capacity and willingness of the state court to deal with reapportionment. By means of a general notice and addition of parties, this suit was broadened and became coterminous with the issues in the federal suit.

The defendant filed a motion on February 29, 1972, in the federal suit for a preliminary hearing on abstention. At the suggestion of the court this motion was put down for a hearing concurrent with the hearing on the merits scheduled

for March 8, 1972. The District Court declined to hear the abstention motion first, and proceeded to the full case. Single App., p. 183. The Distrct Court filed its Memorandum of Decision on March 30, 1972, invalidating the Board's plan not on grounds of the alleged partisan gerrymandering but primarily on the ground that the Board's consideration of political data in the interest of achieving political fairness was impermissible, and had an assumed impact on population deviations and town line cuts. The court's judgment dated April 4, 1972, permanently enjoined use of the Apportionment Board's plan and appointed a master to devise a new plan of apportionment. Notice of this appeal by defendant Gaffney was filed April 13, 1972.

EVENTS AFTER DISTRICT COURT JUDGMENT

The sequence of events occurring after the District Court judgment of April 4, 1972, is relevant to a full understanding of this case and its present posture before this Court.

1. Appellant Gaffney (Defendant-Intervenor below) filed on May 11, 1972, a Motion for Expedited Consideration and a Jurisdictional Statement (the latter also to serve as Brief in the event the motion was granted). On May 22, 1972, the Motion for Expedited Consideration was denied with the added statement that the Chief Justice, Mr. Justice White, and Mr. Justice Rehnquist "would invite the appellant to file an appropriate motion for a stay." 406 U.S. 942. After the District Court denied a motion for a stay on May 26, 1972, the stay motion was presented to Mr. Justice Marshall, referred by him to the full Court, and granted on June 12, 1972. 407 U.S. 902.

2. During this period and pursuant to the District Court's judgment of April 4, 1972, a Special Master was appointed who prepared an alternative plan for judicial reapportionment for Connecticut. On June 9, 1972, the District Court held a hearing to review the Master's plan. Because the

Special Master had available more refined census data than had been available to the Board, Intervenor-Defendant Gaffney (present appellant), in order to preserve his position, submitted a slightly altered version of the Board plan which incorporated the newly available census data. The details of these plans are relevant only to illuminate the possibilities and constraints flowing from census data, and the consequent difficulty in shaping a simple, easily-applied population equality rule for the nation.

3. Despite the order of this Court staying the adverse judgment of the District Court on the State Plan, the Secretary of the State of Connecticut did not take prompt steps to implement the plan for 1972 elections. In a reapportionment case the normal sequence after grant of a stay is to use the invalidated plan on an interim basis pending disposition of the appeal. The dissent by Mr. Justice Douglas from this Court's stay order of June 12, 1972, was based on this understanding. *See, Fortson* v. *Millican*, 406 U.S. 901, 914 (1972); *Georgia* v. *United States*, 406 U.S. 901, 912 (1972); *Bullock* v. *Weiser*, 404 U.S. 1065 (1972); *Whitcomb* v. *Chavis*, 403 U.S. 124, 140 (1971).

Accordingly, on June 15, 1972, Intervenor-Defendant Gaffney moved the District Court to direct the Secretary of the State to implement the stay order of this Court and conduct the 1972 elections under the State Plan. Appended to this motion was a corrective order regarding three or four clerical transcription errors in the plan as to which there never had been any substantive dispute.[1] The requested court order was designed to satisfy Public Act

[1] Appellees' Complaint viewed the clerical errors as providing grounds to attack the constitutionality of the Board plan. See, Complaint, para. 19, Single App., pp. 13-14. When the matter was presented before the District Court, it was not treated as a constitutional infirmity, but dismissed as a mere technicality—"just a problem of map making"—which could be handled in the State court proceedings. See, Trial Trans., Single App., p. 233.

220 of Connecticut, enacted prior to th stay order of this Court to facilitate use of any possible judicial plan. Public Act 220 authorized the Secretary of the State to conduct elections under a revised time schedul upon receipt of a plan approved by a court of competent jurisdiction. This Gaffney motion was heard and denied by the District Court on June 19, 1972.

4. Thereupon a motion for an order directing the District Court to honor this Court's stay of judgment order, to reinstate the Apportionment Board pla, and to order said State Plan into effect for the 1972 legislative elections was presented to Mr. Justice Marshall on June 20, 1972. This motion was denied by Mr. Justice Marshall on July 6, 1972, and at the request of counsel was presented to the Chief Justice, who denied it on July 18, 1972.

5. At that point the quest for a way to have the people of Connecticut hold their regular state legislative election of 1972, rather than face a carry-over of the 1970 legislature, led the parties back to state court and the suit *Miller* v. *Schaffer, Secretary of the State*, No. 173606, Super. Ct., Hartford County, filed July 27, 1972.[2]

The term "parties" at this point may require some elucidation. Throughout both the state court proceedings and the federal court proceedings, as is the case in most reapportionment suits at least outside the South, the primary antogonists have been representatives of the two major political parties, whether or not explicitly so identified. Because state officials who are nominal defendants in reapportionment suits sometimes find their party loyalties conflicting with their official relation to a redistricting apportionment plan, timely intervention is frequently allowed to ensure adver-

[2] The *Miller* suit had been filed November 12, 1971, but had been effectively forestalled when the District Court denied a motion for abstention. See Statement of Facts, *supra*.

sity.[3] In this action intervention effectively if not explicitly was permitted on behalf of Republican and Democratic interests in the federal and state suits, respectively, the electors identified as litigants being subordinate to their role as representatives of the real parties in interest, i.e. the contending political parties.[4]

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[3] See, *e.g., Scholle* v. *Hare*, 367 Mich. 176, 116 N.W.2d 350 (1962) (Republican state senators allowed to intervene to establish adversity because Democratic Attorney General was the "defendant" in the suit brought primarily by Democratic plaintiffs, and the intervenors assumed the primary burden of defense); *Maryland Citizens Committee for Fair Congressional Redistricting* v. *Tawes*, 253 F.Supp. 731 (D.Md. 1966) (intervention of all congressmen permitted to bring before the court all relevant interests); People *ex rel. Engle* v. *Kerner*, 211 N.E.2d 736 (Ill. 1965), *appeal dismissed*, 384 U.S. 981 (1966) and *Germano* v. *Kerner*, 247 F.Supp. 141 (N.D.Ill. 1965) and *Kirby* v. *Illinois State Electoral Board*, 251 F.Supp. 908 (N.D.Ill. 1965) (intervention permitted which resulted in essentially a Democratic-Republican contest on apportionment); *Wells* v. *Rockefeller*, 281 F.Supp. 821 (S.D.N.Y. 1968) (intervention of political candidates and political party club members allowed to permit particularized challenges to the drawing of individual districts).

[4] The press in its coverage of various stages of this action has not hesitated to characterize the contending interests in terms of major party alignment. See, *New York Times*, Oct. 18, 1972, p. 40, col. 2, "Connecticut Democrats Lose Appeal to the State Supreme Court to Block No. 7 Election"; *The Hartford Times*, Sept. 22, 1972, p. 1, col. 1, "Demos Lose Remap Case"; *The New Haven Register*, Aug. 31, 1972, p. 18, col. 1, "Party Interest Reigns Supreme"; *The Hartford Courant*, July 8, 1972, p. 1, col. 1, "State GOP Rebuffed in Try for Voting Under Remap Plan".

This identification extends to the local counsel who have borne the brunt of defending or opposing the State Plan in whatever forum. Robert Satter served as counsel to the Democrats (majority) and Francis J. McCarthy served as counsel to the Republicans (minority) in various capacities in the Connecticut General Assembly in the 1971-1972 session. Defendant-Intervenor J. Brian Gaffney, intervening here as a voter, was also an assemblyman and chairman of the state Republican party. McCarthy has

Miller v. *Schaffer* was broadened to include a motion for mandamus filed by parties supporting the State Plan on July 27, 1972, and directed against the Secretary of the State. The state court on August 23, 1972, issued a mandamus that the Secretary of the State conduct the 1972 elections under the State Plan, corrected the clerical transcription errors in that plan, and specified a timetable for filings and primaries so that the general election could be held on the regular date of November 7, 1972. The mandamus order was sustained on appeal by the Connecticut Supreme Court on October 17, 1972. (*Miller* v. *Schaffer*, No. 7238, Conn. Law. J., Oct. 24, 1972, p.) the election timetable prescribed by the Superior Court having been adhered to in the meantime by denial of a stay.

6. In the interim between state Superior Court action and state Supreme Court action the "party" opposing the State Plan (the Democrats) sought to obtain from the federal District Court a temporary restraining order and injunction against the Secretary of the State to prohibit her from honoring the Superior Court mandamus order to conduct an election under the State Plan. New plaintiffs were utilized (including prospective legislative candidates), the "new" suit being styled *Ajellow, et al.* v. *Schaffer, Secretary of the State, et al.*, Civil Action No. 15,284, rather than a continuation of the original federal suit, *Cummings* v. *Meskill, et al. and Intervenor-Defendant Gaffney.* Intervention again was allowed so that the "party" (the Republicans) who had obtained the mandamus order against the Secretary of the State in the *Miller* suit could now appear to defend against the threatened federal injunction. After

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served as counsel for the plaintiffs in the state court suit, *Miller* v. *Schaffer, supra*, supporting the State Plan, and as counsel for the Intervenor-Defendant in the federal suit, *Cummings* v. *Meskill*, now on appeal in this Court as *Gaffney* v. *Cummings, et al.* Mr. Satter has served as counsel for certain Intervenor-Defendants in the state court suit, opposing the State Plan, and as counsel for the plaintiffs in the federal suit.

a hearing on September 5, 1972 and again on September 15, 1972, Chief Judge Blumenfeld of the District Court denied the motion for an injunction on September 22, 1972. He found that the necessarily truncated time schedule for the election neither impaired any articulable First Amendment right nor denied due process or equal opportunity to voters or candidates.

7. On September 5, 1972, the *Cummings* federal three-judge panel reconvened to hear a motion by Intervenor-Plaintiffs Aronie *et al.* for an order that the 1972 elections be held under the antecedent 1965 plan of apportionment, based on the 1960 census. This motion was denied on September 8, 1972.

8. The 1972 state legislative elections in Connecticut have been held under the State Plan prepared by the Apportionment Board, restored for this purpose by the stay order of this Court of June 12, 1972 and the supportive state court action described above. The issue on appeal is the federal constitutional validity of this State Plan.

SUMMARY OF ARGUMENT

From whatever standpoint the Connecticut plan of state legislative apportionment is viewed, it is neither unconstitutional on its face nor invalid under any proof of invidious discrimination. Evaluated under the "substantial equality" principle of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), or the "de minimis" deviation principle of *Swann* v. *Adams*, 385 U.S. 440 (1967), or under an even tighter principle of district population equality keyed to the census-unit-average population, the Connecticut plan has such miniscule deviations as to be presumptively constitutional on its face under the Fourteenth Amendment.

The average population of the available census units (block groups and enumeration districts) used as building blocks by the bipartisan Connecticut Apportionment Board is 1,100; 88 percent of the 2,746 units exceed 400 persons in

population and 570 units exceeded 1,500 persons per unit. Nevertheless the Apportionment Board, operating in good faith to comply with equal population principles of *Reynolds* and *Swann, supra,* and without any preconceived notions of a cut-off point phrased solely in numerical percentage terms, achieved a remarkably tight "equal population" plan. The highest *absolute deviations,* in terms of actual population deviation from ideal, are only 789 people in the assembly districts and 784 people in the senate. These substantially identical figures, which are well under the census unit average, necessarily produce quite different *percentage deviation* figures when applied to large versus small ideal district population quotas. In the Connecticut plan, these very small absolute deviations yield maximum percentage deviations of 0.93% as applied to the 36 senate districts (ideal population 84,228) and of 3.93% as applied to the 151 assembly districts (ideal population 20,081).

The Apportionment Board therefore achieved a degree of numerical equality in population far tighter than needed to eradicate the evil of gross population malapportionment which called into being the seminal cases of *Baker* v. *Carr,* 369 U.S. 186 (1962), and *Reynolds* v. *Sims, supra.* Indeed, to insist as a federal constitutional requirement on even smaller deviations, thus "crowding" the census data even beyond the point of its reliability, would conflict with the oft-expressed concern of this Court that pursuit of population equality not promote gerrymandering or submerge the voting power of elements of the population. *Reynolds* v. *Sims, supra; Fortson* v. *Dorsey,* 379 U.S. 433 (1965). The *form* of equal population apportionment should not be pursued so single-mindedly as to jeopardize the ultimate *function* of fair and effective representation.

It is important to note also the "percentage trap" regarding the interrelationship, as here, of low ideal district population (unavoidable when a state elects to have many small districts for more pin-pointed representation purposes) and relatively high census unit average population. In

Connecticut the absolute deviation figures of fewer than 800 persons, are lower than the absolute deviation figures in many other states, including plans in which appeals were recently dismissed by this Court. (*See, e.g.*, the Pennsylvania case: *Specter* v. *Tucker*, —— U.S. ——, 41 U.S.L.W. 3181 (October 10, 1972) (*appeal dismissed for want of a substantial federal question*).

Such small deviations as presented here would satisfy even the apparent absolute deviation population principle of *Kirkpatrick* v. *Preisler, infra,* and *Wells* v. *Rockefeller, supra.* These congressional districting precedents, however, are not properly applicable in our view to state legislative reapportionment. A more stringent federal constitutionality rule under the Fourteenth Amendment keyed to the census unit average population is not sought by the present appellant, even though on the facts this Board plan would be constitutional under such a rule. The difficulty with a standard of absolute equality is two-fold: (1) it focusses attention on numbers alone long after eradication of significant population malapportionment has been achieved, and does so even though very small population deviations serve no fair representation purpose; (2) it actually can promote gerrymandering by giving reapportioners authority to freely revise district lines on an "equal" basis while privately consulting knowledge of political behavior patterns for partisan gain.

There is a need for a principle of presumptive constitutionality, necessarily expressed case by case rather than as a uniform percentage deviation figure for the nation as a whole. As noted in *Kirkpatrick* v. *Preisler,* 394 U.S. 526 (1969), a percentage deviation, out of context, is incapable of being judged by any articulable standard of invidious discrimination. We have now reached the stage when definitions of some points of presumptive constitutionality are possible. Such definitions are needed to bring order into reapportionment litigation, and to speed the achievement of certainty and finality, with judicial interven-

tion reserved for proven instances of invidious discrimination. We submit that deviations as small as in Connecticut, falling inside the census unit average, necessarily fall likewise inside any reasonable rule of presumptive constitutionality applicable to state legislative districting. Rules of presumptive constitutionality keyed to de minimis deviations in the context of the particular case will enable courts to continue to block significant population malapportionment, without becoming mired in the details of legislative districting.

Even if the population deviations in the Connecticut plan are deemed to fall ouside the per se facet of a needed rule of presumptive constitutionality, the plan nevertheless is still constitutional when justified under *Swann* v. *Adams, supra,* in the light of the "political fairness" principle utilized by the Apportionment Board as a corollary to the preminent principle of population equality. The political fairness or political balance principle in the context of this case has a two-edged effect. First, it supports the bona fides of the Apportionment Board in striving to design districts of "equal population," because that principle, unlike local line preservation, is not intrisically inconsistent with the equal population principle. Second, if some special justification of the miniscule deviations is still deemed necessary, the political fairness concept provides that justification.

The federal equal population principle necessarily overrides virtually every state-recognized representation consideration of a nonpopulation nature, even though these considerations have as their core an anti-gerrymandering spirit, *e.g.,* the anti-town-line-cut policy in the Connecticut Constitution. Once such a policy is necessarily breached, there is no logical stopping point, or any federally-articulable standard of judgment as to which lines to cut or how many. A political fairness policy, however, enters here as the "surrogate" for all such corollary state policies of fair representation. The political fairness or political bal-

ance policy has two pristine virtues: it achieves directly what a specific policy such as a prohibition on local line-cutting achieves only indirectly; it is capable of being harmonized with any degree of equal population stringency.

One of the strongest points of the Connecticut plan is its incorporation of a political fairness principle. That principle not only checks gerrymandering at the outset, it also provides one of the few rational justifications for the location of *any* district line—once substantial abandonment of traditional lines is mandated by the federal equal population principle. As almost a sole surviving principle of rationality in line-drawing, along with population equality, the political fairness concept not only reduces the many options in line-drawing, it also points those options in the right direction—toward effective representation for the largest possible number of voters.

Both on the first and second branches of this argument—demonstration of constitutionality as keyed to numerical equality or to justifications—we assert as fundamental to order and finality in this field the proposition that a mere showing by challengers of an insignificantly less "deviant" plan is not sufficient to overcome such demonstrations of the constitutionality of an official plan. "One-up-manship" in percentage deviation points is hardly a workable constitutional rule. Such an approach does not contribute to apportionment finality, nor does it respond to the *functional* goal of deriving a fair and effective representation system from the *form* of numerical equality in districting. Indeed it invites frequent judicial intervention into the political thicket, absent the knowledge of the representation realities which would be gained by insisting on proof of invidious discrimination.

Because the Connecticut plan is demonstrably constitutional either in the "minimal deviations" branch or the "justifications" branch of the argument above, the only remaining argument left to appellees is to attempt to show in-

vidious discrimination in the actual application of the federal population equality standard, alone or as interrelated with the state policies of political fairness and reasonable regard for town lines (the vast majority of the latter were not cut). There is no evidence in the record to support the assertion of both the appellees and the District Court that the political fairness policy operated to increase the population deviations. Hence, all that is left of this line of attack would be to attempt to surmount problems of justiciability and burden of proof, and to demonstrate invidious discrimination in particular, substantive terms. *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *Burns* v. *Richardson*, 384 U.S. 73 (1966). Such subsidiary issues as town line cuts, or creation of safe districts, once divorced from any demonstrable relation to numerical population equality per se, yield federally cognizable pleas only if shaped into proof of invidious discrimination.

On this record appellees have not grasped this nettle and sought to make any proof of invidious discrimination in any cognizable Fourteenth Amendment sense. This failure indeed may be a tribute to the operation of the Apportionment Board. As the final element in the three-step bipartisan apportionment process authorized by the Connecticut Constitution, the Apportionment Board itself, it may be noted, incorporates an antigerrymandering principle in the very nature of its creation.

In good faith compliance with all relevant state legislative reapportionment precedents Connecticut has developed an apportionment plan not only presumptively constitutional in numerical equality terms but conclusively constitutional because of failure of any proof of invidious discrimination. In the process Connecticut, by interrelating the equal population concept with the political fairness concept, has served both the formal interests in population equality and the functional interests in fair representation which are intertwined in all legislative apportionment or districting cases.

ARGUMENT

I. THE CONNECTICUT REAPPORTIONMENT PLAN FOR THE SENATE AND ASSEMBLY DISTRICTS IN WHICH THE MAXIMUM POPULATION DEVIATIONS ARE LOWER THAN THE AVERAGE POPULATION OF THE AVAILABLE CENSUS UNITS COMPLIES WITH THE FOURTEENTH AMENDMENT WITHOUT NEED FOR SPECIAL JUSTIFICATION; THE PLAN COMPLIES WHETHER THE RULE OF PRESUMPTIVE CONSTITUTIONALITY (ABSENT PROOF OF GERRYMANDERING) BE PHRASED AS A "SUBSTANTIAL EQUALITY" OR "DE MINIMIS DEVIATION" RULE UNDER REYNOLDS v. SIMS AND SWANN v. ADAMS, OR AS A MORE STRINGENT REQUIREMENT

A. AN ABSOLUTE EQUAL POPULATION RULE FOR STATE LEGISLATIVE DISTRICTS IS NOT NEEDED TO ERADICATE MALAPPORTIONMENT AND EQUALIZE THOSE ASPECTS OF VOTING POWER RELATED SOLELY TO DISTRICT POPULATION, NOR DOES SUCH A RULE PROMOTE THE COROLLARY "FAIR REPRESENTATION" PURPOSES ARTICULATED IN REYNOLDS v. SIMS AS THE GOAL OF REAPPORTIONMENT; BY INCREASING DISTRICTING DISCRETION, AN ABSOLUTE RULE CAN PROMOTE GERRYMANDERING

All major new directions in constitutional law take time to grow, mature, and reach stages of refinement when precise standards can be articulated which both preserve the spirit of the innovation and are clear enough to guide the conduct of those affected and limit the surge of litigation and the burden of judicial review. Racial desegregation in education is one prominent example; legislative apportionment and districting is another.

In reapportionment, triggered by *Baker* v. *Carr*, 369 U.S. 186 (1962), the initial thrust was to combat the gross population disparities among districts which imbalanced voter power and representation on a geographic basis. At the time of *Baker*, a dozen states had at least one state legislative district which deviated more than 500 percent from ideal population. Maximum deviations of at least 50 percent were

very common.[5] By invoking the "substantial equality" rule of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this problem was quite quickly terminated.[6] (See, Appendix A to this Brief, State Malapportionments—1964.)

At the same time, it was recognized from the outset that the relationship between the *form* of apportionment and the *function* of representation is complex. It was sensed that if the result of achieving the perfect form of apportionment through strict numerical equality in districting is concurrently to enhance the ease and subtlety of the gerrymander, then the purpose of reapportionment is lost, effective representation disappears, and the exercise becomes futile. Accordingly, we find Chief Justice Warren, speaking for the Court in *Reynolds* v. *Sims*, at the level of principle and purpose, saying:

> "[T]he achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." 377 U.S. 533, 565-66 (1964).

While insisting properly on substantial equality of population in districting as the foundation principle, the *Reynolds* opinion is full of caveats all going to the basic proposition

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[5] David and Eisenberg, "Devaluation of the Urban and Suburban Vote: A Statistical Investigation of Long-Term Trends in State Legislative Representation," University of Virginia Bureau of Public Administration, 1961; Baker, *Rural Versus Urban Political Power* (1955); Dixon, *Democratic Representation: Reapportionment in Law and Politics* 59-90 (1968); McKay, *Reapportionment: The Law and Politics of Equal Representation* 275-458 (1965).

[6] See dissenting opinion of Mr. Justice White in *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) and *Wells* v. *Rockefeller*, 394 U.S. 542, 553-56 (1969), stating that this problem of geographic malapportionment can be prevented as readily under a "substantial equality" principle as under a "zero variation" principle.

that: "Mathematical exactness or precision is hardly a workable constitutional requirement." 377 U.S. at 577.[7]

This "form-function" distinction in regard to the goal of fair representation found explicit recognition in two cases following *Reynolds* which raised, as *Reynolds* did not, the question of the impact of formal choices in districting on the effective representation interests of political and racial groups of voters. In *Fortson* v. *Dorsey*, 379 U.S. 433 (1965)[8] went out of its way to preserve the question whether districting form (multimember districts in this instance) could unconstitutionally subvert the representation function saying:

> "It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 379 U.S. at 439.

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[7] As Justice Douglas put it in *Wright* v. *Rockefeller*, 376 U.S. 52, 59 n. 1 (1964), decided in the same year as *Reynolds* v. *Sims*, *supra*: "Nor does the Constitution require a scheme for exact equality in districting, let alone a 'mathematically-based procedure for districting which produces contiguous districts nearly equal in population.'" And he went on to cite disapprovingly a computer program for a simple population-based districting.

[8] In *Fortson* plaintiffs sought to overturn Georgia's mixed system of multimember districts and single-member districts, but they argued only that the mixture produced invidious discrimination because voters in the single-member districts chose one man whom they could control, whereas voters in the multimember district (even where the district was subdivided for candidate residence purposes as in Georgia) had no such control over the man resident in their area because the election was at-large and district-wide vote controlled all seats.

However, Mr. Justice Douglas, dissenting, 379 U.S. at 440, did find invidious discrimination, a conclusion necessarily resting on acceptance of the proposition that "representation" involves more than formal population equality in districting.

This statement was repeated in *Burns* v. *Richardson,* 384 U.S. 73 (1966) where the issue was raised, and likewise in *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971),[9] the refusal to invalidate in each instance being based on plaintiff failure of proof, rather than rejection of the principle. Because the focus of the Court's concern in the statements in these cases is actual voting strength, in nonpopulation equality context, these statements evidence a general constitutional concern that any districting form not subvert the effective representation function.

The early post-*Reynolds* litigation eliminated gross population malapportionment, and recent contests under the substantial equality rule have concerned smaller deviations. Indeed current disputed deviations are far smaller than those now considered significant in Great Britain which in pre-*Baker* times was often pointed to as a model of rectitude for the benighted, erring ex-colonies.[10] It is significant that more than 70 percent of all constituencies in England's 516 seat share in Parliament have significantly larger population deviations than have the most deviant constituencies of the Connecticut plan before this Court.[11]

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[9] See the phrasings of the principle in *Whitcomb* at 403 U.S. 143-44, and, in specific racial context of that case, at 403 U.S. 149.

[10] McKay, *supra,* at 29-34.

[11] The reapportioning function in Great Britain has been placed by Parliament (Redistricting of Seats Acts of 1949 and 1958), with four Boundary Commissions for England, Scotland, Wales and Northern Ireland, respectively. The Commission is composed of several members who attain membership by virtue of their position in the governing party or by appointment by one of several government ministers. The current English apportionment was accomplished by the Boundary Commission in 1969 after a labor of four years. Boundary Commission for England, *Second Periodical Report* 2 (1969). The population principle, although nominally the basis for the apportionment, was modified by certain Boundary Commission policies concerning effective representation, *e.g.*, that "local ties were of greater importance than strict mathematical equality." *Id.* at 5. Indeed, it was even thought that the relative

Gross malapportionment produced easily visible defects in the political representation process by overrepresenting the voice of small town and rural districts, and underrepresenting the voice of large cities and suburbs.[12] State legislatures were widely criticized as being unresponsive to modern problems.[13] In this era, unresponsive government generally was viewed as a function of gross population malapportionment, and reapportionment was sought not merely to change *numbers* but to affect the *quality* of government.[14] No similar corollary, either actual or in the popular mind, exists between the miniscule population deviations now being contested and the quality or effectiveness of representation. Responsibility and responsiveness are reached as well at a 10-15 percent maximum deviation level (especially if the deviations in the typical districts are far smaller) as at a 1-5 percent level. Indeed, there is discouragingly little evidence from the several available post-*Reynolds* empirical studies of any close cause and effect relationship between

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compactness of urban districts enabled them to "more conveniently support large[r] electorates" than their rural counterparts. *Id.* at 6. The average or ideal population being 58,190, the Commission fixed a goal of placing 70-80% of all constituencies within a 50,000 to 70,000 range (yielding maximum deviations of +14.7% and —20.3%). The smallest and largest constituencies deviated from the ideal by 33.2% and 36.0% respectively, yielding a total variation of 69.2%.

[12] Baker, *Rural Versus Urban Electoral Power* (1955).

[13] See Charles Press and Charles R. Adrian, "Why Our State Governments Are Sick," 1964 *Antioch Review* 149-65, stating that lack of "timeliness" was the major problem facing state government.

[14] Reapportionment had the additional result of putting an end to the practice of using the old scapegoat of "malapportionment" as the excuse for "unsatisfactory" governmental policies. If there is no change under reapportionment, the people have only themselves to blame, or problems may be truly intractable. In either event responsible government results, and this benefit of reapportionment is not strengthened by insisting on absolute numerical equality.

reapportionment and the character and variety of legislative output.[15]

The dominant present concerns in reapportionment are to devise rules to achieve finality in the apportionment process with minimum litigation, and to avoid "malrepresentation" of significant groups of voters by the manner of line-drawing in the new "equal" districts. To be sure, many elements of malrepresentation, for which gerrymandering is a loose general label, lie beyond effective judicial purview. Nevertheless the *population* standard, which *is* within judicial purview, should not be handled in such fashion as to:

> (1) ease the path of the gerrymanderer by giving him carte blanche to ignore all districting considerations save population equality, while privately consulting his partisan knowledge in a wholly partisan spirit;[16] or
>
> (2) encourage plaintiffs to upset sound and tight reapportionment plans which are the product of a bipartisan board following a political fairness principle as in Connecticut, merely on a showing that a bit more juggling of census units could produce a plan with an insignificantly lower population deviation.

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[15] Dye, *Politics, Economics, and the Public: Policy Outcomes in the American States* 273 (1966); Hofferbert, "The Relation Between Public Policy and Some Structural and Environmental Variables in the American States," 60 *Am. Pol. Sci. Rev.* 73, 81 (1966); Bicker, "The Effects of Malapportionment in the States—A Mistrial," in Polsby, ed., *Reapportionment in the 1970s* (1971); Cantrall and Nagel, "The Effects of Reapportionment on the Passage of Non-Expenditure Legislation," a paper presented to the Conference on Democratic Representation sponsored by the New York Academy of Sciences, New York, New York, November 1-3 (1972).

[16] *See, Reynolds* v. *Sims, supra* at 578-79, warning against an "open invitation to partisan gerrymandering"; *Kirkpatrick* v. *Preisler, supra* at 553-56 (White, J., dissenting), noting that "zero variation" enables legislatures "intent on minimizing the representation of selected political or racial groups" to range freely in line-drawing "so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect."

An absolute population equality rule points squarely in the wrong direction, and in addition poses practical problems not yet fully explored. Census data are not accurate enough or consistent enough to sustain an absolute population equality rule, as the Bureau of the Census would be the first to admit.[17] It would be a tragedy for the reapportionment movement to end prematurely in a tyranny of numbers, forever litigated formally on a "one-ups-man-ship" basis, with the real representation interests concealed.

The need is to develop a concept of "presumptive constitutionality" when minimal population deviation has been achieved. *Swann* v. *Adams*, 385 U.S. 440 (1967), with its concept of *de minimis* deviation points the way. In refining the concept we must bear in mind constraints of census data, the varying size of the districts being constructed, and consequent inappropriateness of applying a single percentage rule of thumb to all situations. In *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), this Court rejected any attempt to define *de minimis* in terms of *fixed* percentage population deviations:

> We reject Missouri's argument that there is a *fixed* numerical or percentage population variance small enough to be considered *de minimis* and to satisfy with-

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[17] Siegel and Zelnik, "An Evaluation of Coverage in the 1960 Census of Population By Techniques of Demographic Analysis and By Composite Methods," in *Proceedings, American Statistical Association* (1966); Siegel, "Completeness of Coverage of the Nonwhite Population in the 1960 Census and Current Estimates, and Some Implications," in Heer, ed., *Social Statistics and the City* (1968). The authors of the first study after a careful analysis conclude at p. 79 that "we know little in a formal manner regarding the reasons for underenumeration or the geographic variations in coverage error." The second study, after noting significant underenumeration of parts of the nonwhite population, concludes at p. 40 that "serious distortion does occur in the figures for many smaller geographic units within the country," such as particular census tracts and enumeration districts where the affected groups may be concentrated.

> out question the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with the adoption of fixed numerical standards which excuse population variances *without regard to the circumstances of* each particular case. 394 U.S. at 530 (Emphasis added).

The appellants do not urge acceptance of a fixed percentage as a way of articulating a *de minimis* standard. The type of analysis which we believe germane in determining whether or not a particular plan should be supported by a presumption of constitutionality is inapposite to such an artificial approach. *See,* Section I-B, *infra.*

Reapportionment must be directed toward the goal of substantial population equality.[18] But neither the presumptive constitutionality nor actual operation of a particular plan can be judged on the plan's percentage deviations in the abstract. The focus for inquiry necessarily must be broader than a mere looking at a deviation figure; as to it standing alone no standard of judgment is available, absent the discredited idea of a single, universally applicable percentage figure. The focus for inquiry necessarily must be on the *circumstances* existing at the time the plan was drafted: the census data, the policies. The Connecticut Bipartisan Reapportionment Board did not proceed from any preconceived notion of the outer constitutional limits of population

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[18] *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 538 (Fortas, J., concurring). "In considering whether the State has 'approximated' an equal division and allocation of the population, I sympathize with the majority's view that a *de minimis* rule of allowable disparities tends to demean in theory and in practice the constitutional objective because it suggests that it is not necessary even to aim at equality. On the other hand, to reject *de minimis* as a statement of the limits on the rule of equality should not lead us to toss aside the wise recognition of the inscrutability of fact and the imperfection of man which is implicit in the *Wesberry* standard: 'as nearly as practicable.'"

deviation.[19] Rather, the plan was constructed by working and reworking census data in the light of three fundamental principles:[20]

> A. (Saden): I recognize the controlling factors, the one man-one vote of Reynolds v. Sims case.
>
> A secondary factor was the attempt in the House to minimize, within reasonable limitations, the number of town line cuts or segmentations, as you may say.
>
> And third I thought that as a corollary of the one man-one vote principle a plan that would be fair would be one that would react as closely as possible in the composition of the respective House or Senate to the actual plurality of vote on the House or Senate lines in a given election.

The judicial standard for presumptive constitutionality must be directed at determining how well the Board plan achieved its stated objectives in the context of the available census data.

State legislative reapportionment needs the development of constitutional rules presumptively validating plans worked out by bipartisan state agencies in a spirit of fairness, provided the population deviations are minimal (*e.g.*, fewer than 800 persons deviation in either house in Con-

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[19] In testimony before the district court, Judge Saden emphasized that the Reapportionment Board did not work from any set of preconceived percentage deviations. "The deviation factors didn't come into the picture until after I had submitted, in the first instance, a Senate plan which had been worked out into deviations. And that plan came out to a deviation factor of less than 1 per cent maximum and minimum." Trial Trans., Single App., at 262-63. Although the district court did not make any special finding concerning this point, the issue was raised and decided as a matter of fact in *Miller* v. *Schaffer*, No. 173606, Super. Ct. Hartford Cty, August 23, 1972, at page 7. "In sum, the Board made the best judgmental adaptation to harmonize federal and state constitutional precepts. It did not aim for an acceptable mark or goal of percental deviation less than equal population. The Board tried to bring the deviation as close to equal population as it could, with a built-in choice of House size most suitable for reasonable respect for town integrity."

[20] Trial Trans., Single App., at 264.

necticut).[21] If the plaintiffs cannot show that the levels of presumptive constitutionality applicable to the particular case have been exceeded, then all courts should stay their hand, unless plaintiffs prove particularized invidious discrimination under the formula of *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), reiterated in *Whitcomb* v. *Chavis*, 403 U.S. 124 1972). With such an approach courts still can block significant population malapportionment. And they will enter the political thicket of representation realities only on an informed basis with the benefit of particularized proof.

B. GIVEN THE LIMITATIONS OF CENSUS DATA AND CENSUS MARGIN OF ERROR, THE DEVIATIONS IN THE CONNECTICUT PLAN ARE PRESUMPTIVELY CONSTITUTIONAL

The determination under the Fourteenth Amendment that a particular reapportionment plan falls outside the range of presumptive constitutionality is in effect an evidentiary conclusion that the impact of the plan is per se discriminatory. To reach such a finding as a matter of law, it is not sufficient for courts to respond in a visceral manner to abstract percentage deviations. Such a finding would be especially unfortunate in the context of Connecticut reapportionment where population deviations, objectively viewed, are a very close approximation to the minimum degree of variance feasible under the constraints imposed by the manner of reporting census data.[22]

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[21] A rejection of a challenge to a plan similarly devised by a bipartisan commission in Pennsylvania was recently approved by this Court. *Specter* v. *Tucker*, — U.S. —, 41 U.S.L.W. 3181 (October 10, 1972) (*appeal dismissed for want of a substantial federal question*). See *Commonwealth ex rel. Specter* v. *Levin*, 293 A.2d 15 (1972).

[22] Census errors and undercounts result from a number of factors. In the 1960 census there was a major undercount of some parts of the nonwhite population, affecting differing areas in differing degrees. See Siegel, "Completeness of Coverage of the Nonwhite Population in the 1960 Census and Current Estimates, and Some Implications," in Heer, ed., *Social Statistics and the City* (1968).

The reapportionment process involves the working and reworking of census units—block groups and enumeration districts. Each of these building blocks has an internal margin of error, and in turn cannot be divided in an attempt to achieve "absolute" district numerical equality without making unsupportable assumptions.[23] The problem of inaccuracies in census reports, therefore, cautions against abandonment of the *de minimis* approach and insistence on absolute equality, which may not be reachable even in *census* terms. Such an approach could easily push the nominal "equality" below the census margin of error.

The outstanding aspect of the Apportionment Board's work is that it devised districts for both houses in which the population of even the most deviant districts varies from the ideal population *by less than the average popula-*

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[23] One aspect of the problem of working with block groups and enumeration districts is brought out in this colloquy between Judge Blumenfeld and Plaintiff-Appellees' expert, Mr. Vocelli:

Q. (Judge Blumenfeld): When you say a group, a census group—is that what you talk about? A. (Vocelli): Right. In other words, when you draw a plan first you sit down with a map, a small map, generally speaking, and you draw up combinations of towns in which you think you might be able to fit so many districts.

Q. (Judge Blumenfeld): But a group consists of how many units, how many persons? A. (Vocelli): Well, that really varies.

Q. (Judge Blumenfeld): That varies, too? A. (Vocelli): Right. And sometimes when you try to draw one of these districts within your original combinations *sometimes you can't get the exact population you're seeking* because these block groups, as they are called, they are the smallest building blocks we had. They ranged anywhere from, I believe the figures are, 1—

Q. (Judge Blumenfeld): But you have to divide a group then to get mathematical exactness and there's no way of knowing who— A. (Vocelli): Well, that's right. *We didn't want to cut any census block groups because then we would be making assumptions that may not be correct.* In other words, we wanted to adhere strictly to census data that was available in time. We didn't want to make any rash assumptions as to estimates by cutting block groups. (Emphasis added.) Single App., p. 235.

tion of the census units available. (See Appendix B to this Brief: Connecticut Census Data and Population Distribution of Districts.) The average size of the 2,746 census units (block groups and enumeration districts in the initial census report) is 1,100 with 88% of the units exceeding 400 population and 570 units exceeding 1,500 population. Nevertheless, the Board produced a plan in which the maximum absolute deviation from the ideal in terms of numbers of persons involved is only 789 persons in the assembly and 787 persons in the senate. Given the practical difficulties with the available building blocks of 1,100 people and the fact that the Connecticut plan has no district whose population deviates by more than 789 people, no tighter plan could reasonably be required under a *de minimis* standard. Whether in fixing the line of presumptive constitutionality this Court would wish to adopt such a tight standard as a showing of deviation lower than census unit average (and it may be deemed too tight in some situations), such a level has an aspect of certainty and neatly fits the facts of this case.[24]

An ingenious challenger, by reshuffling census units slightly or by making various assumptions on how to split census units, can easily produce a plan with slightly lower population deviation. Such a process, which would be invited by rejecting a *de minimis* cut-off point, would rest on the theory that everything was expendable save the population factor. The process could continue all the way down to a purported zero deviation, as to which there still could be dispute flowing from census data inaccuracy or corrected reports. To insist on going below census unit average in order to achieve the level of presumptive constitutionality would reduce constitutional law to the level of shadow-

[24] *Reynolds* v. *Sims*, 377 U.S. 533, 578 (1964), where Chief Justice Warren anticipated a case-by-case determination of the concededly imprecise contours of the basic substantial equality principle within the context of the varying fact patterns presented by different reapportionment suits.

boxing, and would rest on wholly unsupportable assumptions concerning the relationship between apportionment form and representation function.

In constructing a meaningful "presumptive constitutionality" or "de minimis" principle, it is vital to consider the census data in relation to district size to avoid the *percentage trap.* This trap is well illustrated by the Connecticut case. For example, let us hypothesize that a casual observer has been told that in Connecticut the maximum percentage deviation in the house was 3.9% and in the senate 0.9%. It would appear to him that the house districts were not as tightly constructed as the senate districts, and yet this would be an absolutely false conclusion. The number of persons differing from the norm is the same in each house. The census data with units averaging 1,100 persons each has been "pushed hard" by the Apportionment Board so that even the most deviant district differs from the ideal by fewer than 800 persons. And yet, because assembly districts are small with approximately 20,000 population and the senate districts are large with approximately 84,000 population, the same maximum *absolute deviations* of fewer than 800 persons produce maximum *percentage deviations* of 3.9% for the small assembly districts and 0.9% for the large senate districts.

Significantly, of the 16 currently valid lower house reapportionments whose maximum percentage deviations exceed the Board's plan for the Connecticut Assembly, eleven may be said to have relatively small (25,000 or less) average district populations and have encountered similar difficulties in arriving at a plan with very low maximum population deviations.[25]

If Connecticut were a large state like New York or Ohio, where even the lower house districts exceed 100,000 population and the senate districts exceed 300,000, the percent-

[25] The National Legislative Conference and the Council of State Governments, *Reapportionment in the States* 30-31 (1972).

age deviation resulting from the same 800-person absolute deviation would fall to 0.8% for a 100,000 district and to 0.266% for a 300,000 district. An 800-person deviation in a large 400,000 population congressional district would produce a percentage deviance of merely 0.20%. It would be almost incredible to conceive of a court holding an 800-person *absolute* deviation from ideal (and the resulting tiny *percentage* deviation) to be in excess of a "presumptive constitutionality" standard for such large districts. How then can there be any concern for the 3.9% percentage deviation in the small Connecticut assembly districts, when such larger percentage deviation is produced by the same 800-person deviation which allows tiny percentages in the larger districts?

The Constitution does not mandate that the most *numerically* perfect plan capable of being constructed be adopted. *See, Abate* v. *Mundt,* 403 U.S. 102 (1971). A 3.9% deviation *in the Connecticut context* is well within a meaningful standard of presumptive constitutionality, suggested by this Court in *Swann* v. *Adams,* especially when that deviation is related to the small absolute size of the deviation in terms of persons involved—fewer than 800 persons per district.

C. POST-1970 CENSUS REAPPORTIONMENTS IN OTHER STATES CONTAIN LARGER DEVIATIONS BOTH IN ABSOLUTE TERMS AND PERCENTAGE TERMS THAN CONNECTICUT

1. The National Pattern Summarized

Since the beginning of 1970, forty-five states have reapportioned at least one of their legislative houses. Of the forty-five upper house reapportionments, five have been declared unconstitutional although not necessarily finally. Of the remaining forty houses which to date have not been challenged successfully, if challenged at all, thirty-four houses (*85%*) have deviations greater than in the Board plan for the Connecticut senate either with respect to

maximum percentages[25a] (twenty-nine houses), or maximum persons[25b] (twenty-nine houses), or both (twenty-four houses).

Of the forty-two lower houses reapportionments, six have been declared unconstitutional although not necessarily finally. Of the remaining thirty-six which to date have not been challenged successfully, if challenged at all, twenty-one houses (*58%*) have deviations greater than in the Board plan for the Connecticut assembly either with respect to maximum percentage (sixteen houses), or maximum persons (seventeen houses), or both (twelve houses).[26]

2. Reapportionments in Selected States

In Pennsylvania, the state's constitutionally authorized bipartisan Legislative Reapportionment Commission devised a reapportionment plan which was attacked, *inter alia*, on population equality grounds. Of fifty senatorial districts, the smallest (231,172) and the largest (241,360) deviated from the ideal district population by 2.02% and 2.29%, respectively. Of 203 house districts, the smallest (56,675) and the largest (59,845) deviated from the ideal district by 2.48% and 2.98%, respectively. *Commonwealth ex rel. Specter* v. *Levin*, 293 A.2d 15 (1972), *appeal dismissed for want of a substantial federal question*, — U.S. —, 41 U.S.L.W. 3181 (October 10, 1972). (Appellant's Jurisdictional Statement, pp. 26-31, specifically presenting the population inequality claim). The Pennsylvania Supreme Court's decision, sustained by this Court by its dismissal of the appeal, characterized the foregoing deviations as "minimal" and held that "the deviations clearly do not

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[25a] *I.e.*, with at least one district deviating from the ideal by more than 0.9%, as in Connecticut.

[25b] *I.e.*, with at least one district whose population deviates from the average district population by more than 789 persons, as in Connecticut.

[26] The National Legislative Conference and The Council of State Governments, *Reapportionment in the States* 28-31 (1972).

dilute the equal-population principle 'in any significant way.'" 293 A.2d at 15. And yet the absolute deviations are significantly higher than in Connecticut—the most deviant Pennsylvania senate and house districts having deviations from the ideals (235,878 and 58,098) of 5,482 and 1,747 persons, respectively.

Both the house and senate districts in the Ohio apportionment plan, in which this Court dismissed an appeal on other grounds, have larger absolute deviations in terms of number of persons involved than in the Connecticut plan. *Jordan v. Norris*, — F.Supp. — (N.D. Ohio 1971), *appeal dismissed for want of jurisdiction*, — U.S. —, 41 U.S.L.W. 3181 (U.S. October 10, 1972). These deviations are larger than could have been obtained if the ex-officio Ohio Apportionment Board had adhered as closely to census units as did the Connecticut bipartisan Apportionment Board.

In the Ohio case the relevant population facts gleaned from the plaintiffs' complaint are that because of Ohio's large population the ideal size for any of the 99 house districts would be 107,596 and the ideal size for any of the 33 senate districts would be 322,788. With districts of this size, one would expect substantially lower percentage deviations than the 0.9% achieved for the 84,000 population Connecticut senate. That is not the case, even though in Ohio the reapportioners had available the final census report, subdividing the block groups and the enumeration districts into blocks, which data was not available for Connecticut. Even with use of this more finite block data, the Ohio maximum deviations from the ideal in *percentage* terms are as high as those for the Connecticut senate, i.e., for the Ohio house the deviation is 0.998%, and for the senate 0.936%.[27] The absolute deviations in terms of num-

[27] *Jordan* v. *Mahoning County Board of Elections*, No. C 71-1130Y, United States District Court for the Northern District of Ohio, Complaint for Declaratory Judgment and Injunctive Relief and Request for Three Judge Court. See also in this case the Stipulations document.

ber of persons involved are larger than the Connecticut deviations of under 800 persons, the comparable Ohio figures being 3,022 persons for the senate and 1,074 for the house.[28]

It also may be noted that in Ohio the state constitution calls for grouping three house districts to construct one senate district. The policy precludes the attempt, made in Connecticut, to construct senate districts on an equal population basis as nearly as practicable. We are not arguing that such a nonpopulation policy is unconstitutional, even though it guarantees that absolute deviations in the senate will be three times higher than otherwise could be achieved. However, finding room for such a "rational state policy" requires adopting something less than an absolute population equality rule.

The New York legislative apportionment is another case in point. This plan has been sustained in the lower state courts and is now on appeal in the New York Court of Appeals. *In the Matter of Petition of Schwartz,* 300 N.Y.2d 664, 332 N.Y.S.2d 100 (App. Div. 1972), *appeal pending,* Court of Appeals, No. 659-72. For both the New York house and senate the number of persons by which the most deviant district differs from ideal is greater than in Connecticut. For the New York senate, with an ideal size of 304,021, the absolute deviation is 2,795 persons, yielding a percentage deviation of 0.91%. For the lower house with an ideal size of 121,608, the absolute deviation is 2,206 persons, yielding a maximum percentage deviation of 1.81%.[29]

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[28] The actual absolute deviations in Ohio may be even larger than those indicated. The Ohio reapportioners were required by the state constitution to use ward and precinct lines for constructing districts, rather than census unit lines. Such local lines are frequently non-contiguous, with legislative district lines cutting across census blocks. In such instances, the district population figures reported must be estimates.

[29] Interim Report of the Joint Legislative Committee on Apportionment, Albany, New York, December 14, 1971, pp. 8, 36 and 47.

D. THE CONGRESSIONAL DISTRICTING PRECEDENTS AND STATE-LOCAL APPORTIONMENTS

1. Kirkpatrick and Wells Are Not Relevant in Shaping a Presumptive Rule of Constitutionality for State Legislative or Local Apportionments

The congressional districting cases of 1969, *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) and *Wells* v. *Rockefeller*, 394 U.S. 542 (1969), do not require a different conclusion even though they have influenced some lower courts and state legislatures which have pushed population deviations down toward a minisecule 1 or 2 percent or less. There are several grounds on which the apparently absolute population equality rule of these cases may be distinguished from state (and local) reapportionment.

Congressional redistricting rulings are based not on the equal protection clause of the Fourteenth Amendment, but on Article I, Section 2 of the Constitution.[30] There was a difference in the initial phrasings of the equality standards: equal "as nearly as is practicable" for congressional districting; "substantial equality" for state legislative reapportionment with many caveats added in the course of the opinion (see *Wesberry* v. *Sanders*, 394 U.S. at 566; *Reynolds* v. *Sims*, 377 U.S. 533, 579 and see caveats at 577-81). Whether or not this difference was intentional (and Justice Black's subsequent opinion in *Hadley* v. *Junior College District*, 397 U.S. 50, 56 (1970), intimates that it was unintentional), there are logical reasons for a slightly looser rule for state legislative reapportionment and local government districting than for congressional redistricting.

Particularized local interests relate more to state government than to the national government. The greater

[30] Article I, Section 2 relates only to congressional districting and specifies the population factor. By contrast, state-local districting rests on Section 1 of the Fourteenth Amendment which mentions neither representation nor population but specifies a nondiscrimination (equal protection) principle.

number of districts (in Connecticut, 151 lower house districts, 6 congressional districts) make it more feasible to represent those interests in the state legislature than in Congress. Because large congressional districts transcend so many conventional communities of interest, the precise point where their boundaries fall is of less significance than regarding state and local legislative districts. See, *e.g.*, *Abate* v. *Mundt*, 403 U.S. 102 (1971).

Recognition that the foregoing fact warrants some modest flexibility in the population equality rule is found in the opinion of the New Jersey Supreme Court in *Jackman* v. *Bodine*, 55 N.J. 371, 262 A.2d 389 (N.J. 1970):

> Nonetheless the county and the municipality are the meaningful units in state-local relations in many . . . governmental coordination needs, which in many respects are present also between local and state governments.[31]

As discussed above, the larger the population of the districts being constructed the easier it is to report a small *percentage deviation*, even though *absolute deviation* in terms of number of persons involved may be substantial. Congressional districts, averaging 400,000 persons each, are the preeminent example. Deviations of 1%, 2%, 3% and 4% in congressional districting produce absolute deviations—*i.e.*, the number of persons by which a district differs

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[31] This comment echoes the following statement in *Reynolds* v. *Sims*:

> "Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. • • • Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting." 377 U.S. at 578.

from ideal—of 4,000, 8,000, 12,000 and 16,000 persons. A 10% deviation would produce an absolute, or body deviation of 40,000. For congressional districts, therefore it may be feasible or appropriate to insist on small percentage deviations because of the large number of persons represented by each 1% of deviation, and because of the ability to achieve smaller deviations without "pressing too hard" on the available census data.

By contrast, in constructing the small 20,000-population Connecticut assembly districts with census units averaging 1,100 persons the Apportionment Board held the maximum absolute deviations under 800 persons, and held the average absolute deviations under 400 persons. This yielded a percentage deviation of 3.9%, which might sound high if the congressional district ruling of *Kirkpatrick-Wells* were applied. But such application would be clearly inappropriate logically, and would most certainly advance no cause of fair or improved representation.

If these distinctions fail, so that the apparent insistence in *Kirkpatrick* and *Wells* on juggling census units until no further juggling is possible (or on cutting census units and estimating population which has occurred in some states) then it certainly is time to consider modifying the rule of those cases. Under our view of the matter, however, the *Kirkpatrick* and *Wells* precedents are simply not relevant to the Connecticut state legislative situation, and should have no part in shaping a presumptive rule of constitutionality for state legislative apportionments.[32]

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[32] In *Connor* v. *Williams*, 404 U.S. 549 (1972) this Court recently has specifically reserved the question whether the seemingly absolute numerical equality principle of *Kirkpatrick* and *Wells* applies to state legislative reapportionment. At issue was a Mississippi plan in which for the senate the maximum percentage deviation was 9.6 percent, and the *absolute* deviation was *strikingly higher* (4,086 persons) than in the Connecticut senate. For the Mississippi lower house the percentage deviation was even higher, 9.9

2. If the Kirkpatrick and Wells Precedents Are Not Deemed Distinguishable It Is Time To Consider Modifying the Rule of Those Cases

If the foregoing considerations and distinctions are deemed to be insufficient to shield state legislative apportionment from the full impact of the apparent absolute equality rule of *Kirkpatrick* and *Wells*, the rule itself must be strongly questioned.[33] In the first place, the four dissenters from that rule raised serious objections to it which have not been resolved either by logic or experience. The dissenters touched on the countless equal (but politically different) plans a computer following bare population equality can produce, the increased gerrymandering possibilities once local subdivision lines are ignored in pursuit

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percent, and the absolute deviation was 1,799.6 persons (prorated in a multimember district situation where the ideal single-member district population quota would be low (18,171) just as in the Connecticut lower house. The Court, per curiam said:

> "Appellants rely on our recent cases invalidating congressional redistricting statutes that contained total variations of 5.97%, *Kirkpatrick* v. *Preisler* . . . and of 13.1%, *Wells* v. *Rockefeller*, between the largest and the smallest districts. These decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial questions concerning the constitutionality of the District Court's plan as a design for permanent apportionment. . . . If we are to consider the applicability of *Preisler* and *Wells* to state legislative districts, it would be preferable to have before us a final judgment with respect to the entire State." 404 U.S. 451-52.

[33] Although objecting strenuously to the phrasing of an absolute equality rule, Mr. Justice Fortas concurred in *Kirkpatrick* because of the failure of the Missouri legislature to use accurate 1960 census figures, or systematically-obtained new figures for all districts. 394 U.S. 540. He concurred in *Wells* because of New York's policy of seeking equality in terms of regional groupings of districts, rather than on a direct interdistrict basis. 394 U.S. 549. In the basic "equality" rationale of these two cases, therefore, Justice Fortas can be classed as one of the four dissenters.

of absolute population equality, and the need to moderate numerical exactness with a tolerance for reality.[34]

It is also noteworthy that the decisions in *Kirkpatrick* and *Wells* were greeted with some consternation by experienced observers of the apportionment scene, including some participants in the litigation itself, political science specialists, and a high staff member of the National Municipal League.[35]

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[34] The dissent of Mr. Justice White warned that absolute equality downgrades a restraint on the gerrymander, which he said is a greater threat to "equality of representation" than was malapportionment. "Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality. . . ." 394 U.S. 555. He also perceptively observed that if "county and municipal boundaries are to be ignored, a computer can produce countless plans for absolute population equality, one differing very little from another, but each having its own very different political ramifications." 394 U.S. 556.

This last thought was echoed in the dissent of Mr. Justice Harlan, joined by Mr. Justice Stewart, in the observation that "Legislatures prefer to follow traditional county and regional lines so that the demands of blatant partisanship will be tempered by the constraints of history and tradition." Justice Harlan hypothesized that under the freedom of an absolute equality rule, the district lines even more than in the past "are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs." 394 U.S. 552.

Mr. Justice Fortas observed that the *Wesberry* standard "as nearly as practicable" does not refer merely to arithmetical possibilities. In an admittedly hyperbolic statement he suggested that an inflexible insistence upon mathematical exactness, "with no tolerance for reality" or "the boundaries of common sense," could lead to running a district line through a large apartment house.

[35] Plaintiff David Wells in *Wells* v. *Rockefeller* was not seeking absolute population equality; his own alternative plan contained deviation from average of 4.7 percent. He feared that the new numbers-only focus "unless subsequently altered or refined or clarified in some way, can indeed open the way to egregious gerrymandering." Mr. Wells' counsel, Dean Robert B. McKay of the

Writing reflectively three years after his "victory" in the *Wells* case, and deploring the absolute equality rule, David I. Wells had this to say:

> Not only has the Supreme Court failed to face up to the fact that gerrymandering and numerically unequal districts are merely two ways of achieving the same objective of unwarranted political advantage; a series of Supreme Court decisions in 1969 actually made the problem worse. From 1964 until 1969, the court required merely that districts have approximately equal populations. In the latter year, however, it changed its approach to a demand for almost precise numerical equality, even if that meant ignoring natural boundaries, county lines, city lines, geographic compactness and even the boundaries of common sense, as one dissenting Justice put it. To allow districts to have con-

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New York University Law School, observed that "one is left with an uneasy feeling that the majority has settled too quickly for a simplistic, formula based on numbers alone. The prospects are not entirely encouraging."

Two political science specialists in reapportionment shared this worried reaction. Professor Malcolm E. Jewell of the University of Kentucky observed that "existing political subdivisions do have some sense of community and community interest," and hypothesized that "legislatures are less likely to be visible and identifiable to their constituents if legislative district boundaries are completely independent of other existing city and county boundaries." Professor Gordon E. Baker of the University of California at Santa Barbara worried about the prospects for achieving fair and effective representation under an absolute population equality rule. He expressed the hope that the ruling would be "narrowly construed so that the extent to which equality might be practicably achieved both in state, legislative and congressional districting may differ from state to state and from district to district."

Professor William M. Beaney, formerly of the political science faculty at Princeton University and now on the University of Denver law faculty, said that "anyone familiar with the realities of the legislative process recognizes that any attempt at precise equality accomplishes nothing that goes significantly beyond the accomplishment of substantial equality—i.e., 5-10 percent deviation from the average." The foregoing comments are reported in Dixon, "The Warren Court Crusade for the Holy Grail of 'One Man-One Vote,'" 1969 *Supreme Court Review* 231-233.

> torted shapes, to require that political subdivision lines be ignored and to demand that numerical equality be the only consideration in drawing district lines is to open the floodgates to gerrymandering, for it means that those who draw the lines have a ready-made, judicially sanctioned excuse for wandering all over the map—literally—as long as they end up with districts of equal population. And this is precisely what has been happening.[36]

Surely these observations put in serious question the wisdom of imposing an absolute population equality rule at what Mr. Justice Fortas has called "this relatively early stage of the reapportionment effort."[37]

E. BASED ON THE RECORD BELOW, ANY REASONABLE STANDARD OF PRESUMPTIVE CONSTITUTIONALITY HAS BEEN MET BY THE CONNECTICUT REAPPORTIONMENT PLAN

1. The Necessity of Articulating a De Minimis Standard in Terms of Presumptive Constitutionality

As applied to the facts of the Connecticut case, the foregoing considerations for not requiring any tighter numerical equality rule than achieved by the State Apportionment Board are all-compelling. Indeed, given the constraints imposed by the size of the available census units, the plan is well below the level of any reasonable "substantial equality" or "de minimis" requirement for determining its constitutionality. There are instances in which higher absolute deviations have been judicially approved in post-1970 reapportionments. (*See,* Section I-C, *supra.*) By "presumptive constitutionality" is meant a level of population deviation so small that the plan may be upheld unless invidious discrimination specifically is shown, *e.g.,* proof of partisan or racial gerrymandering. The phrase "presumptive constitutionality" simply restates in functional terms the "substantial equality" and "de minimis" concepts of *Reynolds* and *Swann.*

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[36] David I. Wells, "The Impact of Gerrymandering," *The American Federationist*, February, 1972, p. 14 at 15.

[37] *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 540 (1969).

No decision of this Court in a state legislative or local government case under the equal protection clause of the Fourteenth Amendment suggests any constitutional infirmity in the Connecticut plan. *See, Kilgarlin* v. *Hill,* 386 U.S. 120 (1967); *Swann* v. *Adams,* 385 U.S. 440 (1967); *Reynolds* v. *Sims,* 377 U.S. 533 (1964). In *Reynolds,* the Court was alert to the danger of gerrymandering flowing from a promiscuous recasting of local district lines in pursuit of population equality with all other considerations abandoned. The opinion warned that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." 377 U.S. 578-79. The opinion also stated that somewhat "more flexibility may . . . be constitutionally permissible with respect to state legislative apportionment than in congressional districting" (377 U.S. at 578) in order to minimize artificiality in district formation.

Despite the impossibility of articulating a simple all-encompassing rule in percentage terms, a *de minimis* concept of population deviation, better labeled a "presumptive constitutionality" rule, is a needed adjunct of the constitutional law of fair representation. It will serve the purpose of defining that point at which a state has presumptively complied with the equal protection of the laws under the Fourteenth Amendment. Unless a challenger can show that the minimal population deviations are above the level of presumptive constitutionality, the plan should be upheld. Definition of such a point is needed to bring order into reapportionment litigation, to regularize it, and to speed the achievement of certainty and finality in reapportionment.[38]

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[38] The difficulties in rejecting any standard of presumptive constitutionality have recently been exposed by the Supreme Court of Iowa. *See, In re Legislative Districting of the General Assembly (Noun* v. *Turner),* 193 N.W.2d 784 (Iowa, 1972); *In re Legislative Districting of the General Assembly (Rasmussen* v. *Ray),* 175 N.W.2d 20 (Iowa, 1972).

In *Noun* v. *Turner,* plaintiffs challenged a reapportionment con-

2. The District Court Based Its Decision on an Erronous Finding of Fact and Never Reached the Presumptive Constitutionality Question

The primary difficulty with the District Court's conceptualization of the *de minimis* rule (Memorandum of Decision, Single Appendix, p. 9a) is that the court never attempted to define and then apply its formulation. Although its assertion was unsupported by any citation to the Record, the District Court first concluded that the population disparities could have been less had political fairness not played a role (*id.* at 7a-8a). Significantly, the court did not first consider what was an appropriate *de minimis* standard for this case. This would seemingly be a prerequisite to determining whether the population deviations

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structed with 1970 decennial census data which resulted in great mathematical precision. In the 50-district Senate, the largest (57,365) and smallest (55,575) deviated from the ideal (56,500) by +1.6% and —1.6%, respectively. Absolute person deviations were 865 and 925, respectively. In the 100-district house, the largest (28,833) and smallest (27,769) districts deviated from the ideal (28,250) by +2.1% and —1.7%, respectively. Absolute person deviations were 583 and 481, respectively. A plan devised by the League of Women's Voters which had slightly lower deviations was noted by the Court not ". . . as an alternative plan but rather its demonstration of applicant's principal thesis; namely, that plans more equal in population can be developed." 193 N.W.2d at 790. Because of this "demonstration", the burden of proof shifted to the advocates of the reapportionment plan to show why their good faith efforts at achieving numerical accuracy were not as minutely successful.

The main criticism of this approach is that the court's attention is no longer focused on the alleged constitutional injury (invidious impact) suffered by the electorate, but rather is directed toward analyzing the permissibility of various *inputs* during the redistricting process. Given such a format, counsel should not have difficulty: (1) devising an alternative plan with slightly lower numerical deviations, thus winning for his client the evidentiary advantage; and (2) finding certain inputs into the redistricting process which can be described as "political" and "without rational basis" which allegedly accounted for increased numerical deviations.

were valid on their face, and in considering whether the deviations were justified even if they were outside the range of presumptive validity. What the court did was to conclude, without proof, that the effect of a particular state policy increased population disparities from an insignificantly lower level. It then condemned this alleged "effect" as a violation of the court's still unarticulated *de minimis* rule. In practical result, the *de minimis* level was defined as perfect population equality, or at least as the level of the numerically tightest plan in the Record. The court then proceeded to reject as a justification for population deviations the already condemned political fairness policy. This circular reasoning process, founded on a factual fallacy, was tantamount to assuming the answer by the manner of stating the question.

In short, Connecticut has adopted a presumptively constitutional plan on any reasonable population test and the plaintiffs have not sustained their burden of proving to the contrary.[39]

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[39] To be sure, they have alleged, almost *ad nauseum*, that the political fairness principle (which was followed by the Board as a partial guide in drawing the many new district lines necessitated by the tight population equality guidelines) operates to increase the population deviations. There is not one iota of evidence in the voluminous Record to support that assertion. And this is so despite the fact that the District Court purported to make such a finding in its opinion.

On this point the Court's attention is invited to the lengthy deposition of Judge Saden, a member of the Apportionment Board (Single Appendix, pp. 20-78) and the deposition of James Collins, who was an assistant to the Board in drafting plans (*id.* at pp. 79-130), and the trial transcript (Single Appendix, pp. 183-267). That a political fairness principle was included in the Board's work is obvious. Indeed, this was one of the virtues of the operation of this bipartisan Board with tiebreaker, as is developed in Section IV-D, *infra*. The interrelation of the political fairness principle and the town line cuts is dealt with in the depositions and trial testimony at great length. It is noteworthy that of the plaintiff-appellees four proposed plans (Pl. Exs. 20-23, Single Ap-

II. THE "POLITICAL FAIRNESS" PRINCIPLE, CONSIDERED BY THE CONNECTICUT REAPPORTIONMENT BOARD AS A NECESSARY COROLLARY TO SUBSTANTIAL POPULATION EQUALITY, IS A RATIONAL STATE POLICY RELATED TO THE ULTIMATE PURPOSE OF REAPPORTIONMENT—FAIR REPRESENTATION; IT DID NOT DISTORT POPULATION EQUALITY, AND THUS FURTHER SUPPORTS THE CONSTITUTIONALITY OF THE STATE PLAN

A. POLITICAL FAIRNESS AS A RATIONAL STATE POLICY IS DEMONSTRABLE EVIDENCE OF GOOD FAITH COMPLIANCE WITH THE REPRESENTATION GOALS OF REAPPORTIONMENT WITHIN A DE MINIMIS LEVEL OF POPULATION DEVIATION

The fact that the Connecticut Apportionment Board achieved a plan with maximum deviations smaller than the average size of the census units being used is demonstrable evidence that the Board made a good faith effort to comply with the "substantial" or "practicable" equality rule of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), and the restated "de minimis" rule of *Swann* v. *Adams*, 385 U.S. 440 (1967). No evidence in the lengthy depositions of Board Member George A. Saden and Board Assistant James F. Collins, or in the Trial Transcript (Single Appendix, pp. 20-130) supports any conclusion to the contrary. A link is shown between the political fairness policy and some minor increase in town line cuts but *no adverse link whatsoever* between the political fairness policy and the population deviations in the districts created by the plan.[40]

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pendix, pp. 178-81; 226-30), the only one which has smaller population deviations than the State plan cuts more town lines (58) than the Board's plan (47). Trial Trans., Single App., p. 230. But one would think that plaintiffs were preparing for a state trial, not a federal action. Town line cuts are a state issue, not a federal issue, absent an allegation and proof of invidious discrimination (Section III-D-3(6), *infra*).

[40] The slightly lower population deviations in one of the four plans submitted at trial by appellees were achieved *not* by supposedly abandoning a policy of considering political data but by cutting even more town lines than cut by the Board (Pl. Ex. 23, Single App., p. 230).

The holding in *Swann* v. *Adams, supra,* establishes a presumption of constitutionality for reapportionment plans which have a *de minimis* numerical population deviation; deviations above a *de minimis* level may be permissible if justified by a rational state policy which is itself reasonably related to the democratic representation purposes of the reapportionment process. Because the deviations in *Swann* were substantial, this Court was not compelled to develop comprehensive guidelines for applying a *de minimis* standard. The primary concern was to allow for some margin of understandable deviation within which parties challenging reapportionment plans must sustain the burden of proving discriminatory impact. Although the opinion of Mr. Justice White spoke in terms of "unavoidable error", we do not believe that the presumption of constitutionality may be overcome merely by plaintiffs submitting an alternative plan with slightly lower deviations. Such an approach would make any presumption of constitutionality illusory.[41]

Part I of the Brief demonstrates that Connecticut has actually achieved deviations *below* a *de minimis* level, even if that term is now to be defined in stringent numerical equality terms. Therefore, the rational state policy of striving for political fairness is relevant in the context of this case as *corollary* evidence of the good faith of the Board and the soundness of the State plan, rather than as needed justification of conscious population deviations.

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[41] That the presumption of constitutionality is not a mere formality which may be callously disregarded was made evident in the dissent in *Swann* (Harlan, J., joined by Stewart, J.): "This holding seems to me to stand on its head the usual rule governing this Court's approach to the validity of legislative enactments, state as well as federal, which is, of course, that they come to us with a strong presumption of regularity and constitutionality. [Citations omitted.] Accordingly, I do not believe the burden is on the State to justify every aspect of a complex plan completely restructuring its legislature, on pain of its being declared constitutionally invalid by the judiciary." 385 U.S. at 447-48.

Tight population equality was sought as a preeminent goal. But that goal was not viewed in the light of *Reynolds* and *Swann*, or other Fourteenth Amendment cases as a mathematical absolute requiring a total disregard of town line cuts and a juggling of census units until absolute ground zero, in census unit terms, is reached.[42] *See, e.g., Hadley* v. *Junior College District*, 397 U.S. 50 (1970); *Abate* v. *Mundt*, 403 U.S. 102 (1971).

B. POLITICAL FAIRNESS IS A RATIONAL STATE POLICY JUSTIFYING THE ACTUAL DEVIATIONS IN THE CONNECTICUT STATE APPORTIONMENT EVEN IF SUCH DEVIATIONS ARE DEEMED TO EXCEED A DE MINIMIS LEVEL OF PRESUMPTIVE CONSTITUTIONALITY

Even if this Court feels the time has not yet come to clarify the guidelines which are needed in order to reinforce the presumption of constitutionality for reapportionment plans, the miniscule deviations reflected in the Connecticut State Plan are justified under the "rational state policy" approach announced in *Swann:*

> *De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house

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[42] Absolute equality in a numerical sense is not possible, because of limitations imposed by the varied size of census units, and the recognized margins of error in canvassing procedures. Theoretically a computer could be instructed to preserve contiguity, ignore compactness and any other consideration, and then group and regroup census units into the designated number of districts until a single "most equal" plan were reached—in terms of the census units then being used. Conceivably no such one plan would eventuate; most certainly many plans would eventuate in which the absolute deviations, in terms of number of persons, would vary by under 100 persons. It would fly in the face of common sense, given the census margins of error and the fact that representation quality is not a function of deviations this small, to designate the preferred plan as the one which represents the last census unit shuffle a computer can make. As soon as any other factor than census units, contiguity, and population equality enters in, the number of alternative plans which quite reasonably satisfy the mixed criteria rises dramatically.

> districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy. 385 U.S. at 444.

The real thrust of *Swann*, responsive like *Reynolds* to the complexities of the field, is the awareness of the interrelation between the form (reapportionment) and the function (representation). Reapportioners are advised to strive mightily for "equality" in population terms, and to be able to articulate with some clarity the corollary non-population elements which entered into the plan and are relevant in judging its validity as a non-discriminatory exercise of state power under the equal protection clause. Because reapportionment is a *representation*-directed process, those who draw lines may legitimately consider some elements other than bare population. Indeed they *must*, because a bare population approach will produce multiple sets of equal population districts and provide no rational basis for the final choice.

The process of reapportionment, therefore, may be viewed as encompassing two separate, yet interrelated, sets of considerations. One set is population equality, the focus for most judicial pronouncements during the past decade. The other set of considerations, of which courts have taken notice but have not clothed with precise meaning, may be identified under a general rubric—the "representative factor". The following issues relating to reapportionment have been presented before the courts as appropriate subjects for judicial inquiry: a policy against cutting local political unit lines, compactness and contiguity, avoidance of racial-political gerrymandering, preservation of local communities of interest, stability and continuity in districting, avoidance of artificiality in devising the lines of "equal" districts, and others. *See, e.g., Reynolds* v. *Sims*, 377 U.S. at 578-81; *Kirkpatrick* v. *Preisler*, 394 U.S. at 530. Although the "representative factor" has been articulated in an imprecise and often overlapping fashion, it is as vital

as population equality to the achievement of over-all equity in reapportionment.

Not all of the listed considerations are consistent among themselves, or compatible with a fundamental policy of substantial equality of population in districting. Functionally viewed, however, they point in the same direction. All are aimed at achieving the common goal of *political fairness* in the actual operation of reapportionment plans. Legislative representation and political power are at stake, and it is instinctively and properly realized that numerical equality alone guarantees neither avoidance of gerrymandering, stating the problem negatively, nor attainment of "effective representation" in *Reynolds* v. *Simms* terms. 377 U.S. at 578-79.

Each one of the fragmented considerations if pursued with single-minded intensity is inconsistent with the major premise of substantial population equality. For example, the inconsistency of an anti-town-line-cut policy and population equality is recognized by all parties to this Connecticut litigation. (See discussion, *infra,* Section III-D-3-b.) The problem of harmonization of population equality and any one of the listed considerations is rendered difficult by the indefinite contours of presumptive constitutionality keyed to *de minimis deviations* per se. It is also rendered difficult by the uncertain parameters of the "justifications" principle whereby plans not per se "equal" enough may achieve constitutionality if related to the purposes of corollary rational state policies concerning fair representation.

To all of the foregoing statements of difficulties in intermingling a population equality policy with any other policy related to the ultimate goal of fair and effective representation there is one outstanding exception, namely, a policy of *directly* pursuing political fairness as a corollary goal of population equality. All of the separate policies listed are really indirect or secondary safeguards against political gerrymandering. They are concerned with avoidance

of political imbalance; or in the affirmative, with paving the way for political fairness. Therefore a policy overtly stated as a political fairness policy is a surrogate for all of the listed policies, and more. It is a *direct* and *primary* medium to guard against partisan political gerrymandering—the goal which all of the other policies approach indirectly. More significantly, a political fairness principle, uniquely among all representation-related considerations just mentioned, is *fully compatible* with an equal population equality principle. Only political fairness, directly pursued rather than murkily pursued through such vagaries as "anti-town-line-cut" policies or "community of interest" policies, enables a harmonization of the "form" of equal population districting and the "substance" of maximizing effective representation for the largest possible number of voters.[43]

C. IN CONNECTICUT THE POLITICAL FAIRNESS PRINCIPLE WAS UTILIZED BY THE APPORTIONMENT BOARD AS A COROLLARY PRINCIPLE WITH POPULATION EQUALITY IN ACHIEVING A PRESUMPTIVELY CONSTITUTIONAL AND NON-DISCRIMINATORY REAPPORTIONMENT PLAN

1. The Anti-Gerrymandering Purpose of the Reapportionment Process Specified in the Connecticut Constitution

One of the primary reasons for authorizing reapportionment by a bipartisan board with tie breaker is to avoid discriminatory reapportionment by one party against another. This type of discrimination can be averted or at least minimized at the outset by using the bipartisan method of reapportionment. It is extremely difficult to check after-the-fact, given the problems of justiciability, proof, and standards of judgment of invidiousness.[44] Another reason for authorizing reapportionment by bipartisan board is to bring out into the open the "dirty little secret," which all know but like to deny, especially in litigation, that reappor-

[43] The stated goal is analogous to the Benthamite "greatest good of the greatest number" principle.

[44] See, *e.g.*, *Sincock* v. *Gately*, 262 F.Supp. 739 (D.Del. 1967).

tionment is a political process throughout, and that every line drawn has a political character. Political knowledge informs most of the reapportionment efforts coast-to-coast, as evidenced by journalist comment on the operation and product of all kinds of reapportionment agencies. Even if reapportionment is done on a chance basis by a nominally blind reapportionment process, this amounts to playing "Russian roulette" with the question of political or racial discrimination in line-drawing.

The Connecticut Apportionment Board came into operation under the state constitution, which regulates the entire process of reapportionment (Art. III, § 5, Juris. Statement, p. 16a), only after two political failures to reapportion had already occurred: failure to achieve the required two-thirds vote in both houses; and failure of an even-numbered bipartisan commission set up by the legislative leaders of each party to reach agreement. There is no gubernatorial veto over reapportionment in Connecticut. Had agreement been reached in either of these two initial processes, the present suit most likely would not be in this Court now. And yet in any such agreement the use of past election data would have been a normal part of the reapportionment process, just as in the politically-informed reapportionment processes in other states,[45] and just as in the Apportionment Board operation.

Given this background on prior reapportionment attempts in Connecticut and the political realities of reapportionment in all states, the Apportionment Board would have been derelict in its duty had it either (a) operated in politically knowledgeable and politically *partisan* fashion, or (b) politically *blind* fashion playing Russian roulette with the real danger of discriminatory districting. As Justice White has said in the *Kirkpatrick* and *Wells* cases:

> "In reality, of course, districting is itself a gerrymandering in the sense that it represents a complex blend

[45] The National Legislative Conference and the Council of State Governments, *Reapportionment in the States* 28-31 (1972).

> of political, economic, regional, and historical considerations. If county and municipal boundaries are to be ignored, a computer can produce countless plans for absolute population equality, one differing very little from another, but each having its own very different political ramifications." 394 U.S. at 554-55.

This thought was echoed in the opinion of Justice Harlan, joined by Justice Stewart, in the same proceeding:[46]

> "A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues. The legislature must do more than satisfy one man-one vote: it must create a structure which will in fact as well as theory be responsive to the sentiments of the community." 394 U.S. at 551.

The Apportionment Board took the middle course, the more difficult and more responsible course, of seeking to avoid the creation of a discriminatory districting plan for the house or senate, by considering both population equality and political realities. It did so in a spirit of harmonization of the population and political elements which together determine the ultimate goal of "fair and effective representation." *Reynolds* v. *Sims*, 377 U.S. at 565-66. This policy choice necessarily required consideration of political realities and representation interests transcending bare numbers just as in the operation of the Boundary Commission in Great Britain, where local hearings are held over a period of years (four years for the 1969 Redistricting Plan) and final scrutiny and comments by all polit-

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[46] These congressional redistricting cases are not relevant on the question of determining a "practicable" level of population constitutionally required under the Fourteenth Amendment for state redistricting (see Section I-D, *supra*, and *Abate* v. *Mundt*, 403 U.S. 102 (1971)), but are relevant as highlighting the shared dangers, in congressional redistricting and state-local redistricting, of political invidiousness and of thwarting of the substantive goal of effective representation.

ical parties is part of the regular process of parliamentary redistricting.[47]

This policy choice flows indeed from a natural reading of Art. III, § 6, of the Connecticut Constitution itself setting up the safeguarded three-step process culminating in the bipartisan-tiebreaker apportionment board.

The rational policy choice of political fairness constitutionally prescribed in Connecticut has several facets. The *first* element is to leave the apportionment function in the hands of the legislature, while safeguarding against an easy power grab by the dominant party by requiring an extraordinary majority (⅔) to enact the plan.[48] The *second* element is not to transfer reapportionment to some chance process after legislative failure, but to transfer it to the eight-man bipartisan legislative commission. It is safeguarded both by its bipartisan composition and by a three-fourths majority requirement against the dangers of single-party control, a partial sell-out by one party, or politically unfair districts even if absolute population is sought.

In the event of commission failure, the *third* element of the rational state policy is to transfer reapportionment to yet another politically-safeguarded agency. The legislative leaders of each party choose one judge of the state Superior Court to sit on the Apportionment Board, and these

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[47] After completion of the tentative reapportionment, the Boundary Commission accepted the suggestion of the leaderships of the political parties represented in the House of Commons and met with these leaderships to discuss with them the proposed action. Thereafter, during the ironing out process, there were at least seven further such meetings between the Boundary Commission and the party leaders. Boundary Commission for England, *Second Periodical Report* 3 (1969).

[48] This is a more reliable safeguard than relying on the governor's veto power, because the governor is frequently of the same party as the dominant party in the legislature.

two select a third elector—thus carrying the spirit of political fairness into the tiebreaker selection process itself. The two party-selected board members could agree on a third, or one could prepare a list of acceptable names from which the other could make a selection—the actual process used in this instance with the Democratic-appointed board member preparing the list and the Republican-appointed board member making a selection.[49]

This carefully devised system of reapportionment for Connecticut, adopted in 1965 as a reasoned response to the *Baker* and *Reynolds* rulings, demonstrates that the voters who embedded the system in the state constitution were keenly aware of the fundamentally political nature of reapportionment both in process and in result—a fact not at all changed by adding the federal requirement of equal population. The Connecticut system chooses not to ignore but to recognize and regulate the political element.

2. The Policies of the Apportionment Board

Apportionment Board Member George A. Saden articulated at several points in the record the Board's primary concern for population equality as a federally required and fundamental goal, and its corollary use of the rational state policy of political fairness as a guide in determining where to draw district lines, given the many "equal line" possibilities and the need to preserve the anti-gerrymandering spirit of the state's town line policy.[50] The over-all guiding

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[49] Q. (Satter): And how was Thim appointed as the third member of the board? A. (Saden): I received a letter from Mr. Parskey with a list of six names of six judges and Mr. Thim's name was on the list. Mr. Parskey indicated in his letttr that anyone of the six were satisfactory to him so I selected Mr. Thim on that basis and we agreed on Thim. Saden Deposition, Single App., pp. 21-22.

[50] A vast majority of the town lines were preserved (see Section III-D-3-b). However, once the state prohibition on cutting town lines was overridden by the federal equal population concept,

principles utilized by the Apportionment Board were articulated by Judge George A. Saden as (1) the equal population or "one man-one vote principle" of *Reynolds* v. *Sims, supra;* (2) an attempt to minimize town line cuts and segmentation insofar as possible; and (3) "as a corollary of the one man-one vote principle a plan that would be fair", i.e., one that would interrelate "as closely as possible" the composition of each house and the "actual plurality of vote on the House or Senate lines in a given election." [51]

The meaning of these Board policies was further amplified in the following colloquies at trial between plaintiffs' attorney, Mr. Satter, and Judge Saden:

> "Q. (Satter): What do you mean by fairness in this case?
> "A. (Saden): Fairness is a plan that will meet the one man, one vote test and will reflect the vote on the Senate and House lines in the elections in this relatively same percentage proportion, both in control of those Houses as they reflect the plurality of the vote on the total Senate and House lines in the State and not the great disparities that you have under the reapportionment plan for which incidentally Mr. Parskey was largely responsible back in 1964 when—" [52]
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> * * *
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> "Q. (Satter): And those were the two factors that you had in mind, a low percentage deviation and an over-all fair plan. Were those the dominant factors in your mind?
> "A. (Saden): Plus the fact that keeping in the House, at least trying to as far as we could to maintain town integrity on lines, although I realized in

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nothing remained of that policy that could give explicit guidance to the Board on specific town cuts, other than the prohibition clause's own underlying political fairness spirit.

[51] Trial Trans., Single App., p. 264, quoted in full at fn. 20, *supra.*

[52] Saden Dep., Single App., p. 38.

the House we weren't going to be able to do as well as we could in the Senate." [53]

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"A. (Saden: . . . and secondly, I think that you cannot look at these plans piecemeal without taking into consideration as a third factor the over-all politi cal composition of a plan. The present reapportionment plan, or the one in existence prior to this one, is completely lopsided for that very reason, when you get the kind of representation in both Houses that you have had in '66 and '68 and '70 which are way out of whack compared to the actual plurality of vote in favor of the party in control in those three elections; this is a factor toward the development of a fair plan. It is a corollary to the idea of the one man, one vote theory. The effectiveness of any man's vote who votes for the minority in an election is diminished if he is being swamped in representation in the House or the Senate because of some arrangements of districts that don't give him a voice or the proportionately equal voice that he should have. It's conceivable, for example, that you could have—take an extreme situation where every district in the State is won by one vote by one party or the other, and in that event there would be no representation for the very substantial minority number of electors who voted in that election. You would have a complete sweep of representation. Now that to me is effectively defeating the one man, one voice theory, is a largely disproportionate population arrangement." [54]

Apportionment Board Assistant James F. Collins explained his conception of the Board's policies in this colloquy with plaintiff-intervenors' attorney, Mr. Beizer:

Q. (Beizer): Specifically were you given any instructions by Judge Saden after the time that he was appointed as one of the members of the panel?

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[53] *Id.* at 36.

[54] *Id.* at 45.

A. (Collins): I think I already testified that his instructions were he wanted a plan that was mathematically as exact as we could get it, number one; and he wanted a plan that would be a fair plan in the sense that either party, whichever party carried the State should carry that particular branch.[55]

In none of these articulations of Appointment Board policy is there any derogation of the population equality principle. This principle was taken as a given. Indeed, as demonstrated in Section I, *supra*, it was interpreted and implemented in such a stringent equal population spirit that Connecticut is one of the few states to achieve deviations below the census unit average. There has been a natural feeling of uncertainty among reapportioners as to whether the congressional districting cases, *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), and *Wells* v. *Rockefeller*, 394 U.S. 542 (1969), have some applications to state and local reapportionment too,[56] and therefore a strong tendency to err on the low side regarding numerical equality.[57]

Interpreted on the low side the population equality principle necessarily overrode the Connecticut constitutional

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[55] Collins Dep., Single App., pp. 115-16.

[56] *See Connor* v. *Williams*, 404 U.S. 549 (1972), in which this Court, per curiam, indicated that *Kirkpatrick* and *Wells*, as congressional redistricting cases, have separate constitutional foundation, and that their application in whole or in part to state legislative reapportionment has not yet been determined.

[57] This aura of caution, exemplified by the straining of reapportioners and lower courts for deviations so tiny as to be anomalous under foreign precedents, actually presses census data beyond the bound of reliability. *See e.g., In re Legislative Districting of General Assembly*, 193 N.W.2d 784 (Iowa 1972). But such precautionary activity is not a substitute for an open and reasoned articulation of considerations relevant to a Fourteenth Amendment rule as a prelude to authoritative pronouncement by this Court.

prohibition against cutting any town lines,[58] thus creating a further problem for the Board. The problem was how to preserve *something* of the anti-town-line-cut policy while at the same time achieving the still uncertain level of equality mandated by the *Reynolds-Swann* "de minimis" principles. Only by cutting still further town lines could a deviation lower than the actual 789-person deviation be achieved. Appellees have at one point (Complaint, Single App. pp. 8-9) criticized the Board for dishonoring the Supremacy Clause by cutting more deeply than federally required into the state anti-town-line-cut policy. However, this argument is more than slightly disingenuous because appellees have also criticized the Board for not going far enough and reducing population deviations still further. And yet the only one of the appellees' four places which deviates from ideal by slightly fewer persons than in the Board plan cuts more town lines than cut by the Board. (Pl. Ex. 23, Single App., p. 230).

3. The Political Fairness Principle Is Responsive to the Unavoidable Policy Choices Confronting Reapportionment Agencies, and Harmonizes Fully with Population Equality

A reapportioning agency cannot have it both ways. It cannot maximize population equality and also maximize preservation of local boundaries. The two are intrinsically incompatible. It can seek to maximize the highest combination of values possible: *population equality* in order to prevent underrepresentation in the legislature of residents of a series of overly large districts; and *political fairness* in order to avoid the imbalanced accumulation of submerged voting minorities in a series of districts, *i.e.,* voters with a numerically equal vote in population terms which is worth zero in terms of political effectiveness. As Chief Justice Warren said: "legislators represent people, not trees or acres." *Reynolds* v. *Sims,* 377 U.S. at 562. And because

[58] Connecticut Constitution, Art. III, § 4.

people are not fungible, but have widely different interests in political expression, the function of legislative district construction necessarily must take into account this non-fungibility to avert the danger of creating *formally* equal districts which *substantively* discriminate against some identifiable and meaningful political representation interests.

The solution achieved by the Connecticut Apportionment Board of combining population equality and political fairness is to be praised, not criticized. These two values, unlike population equality and preserving town lines, are intrinsically compatible, and indeed reinforce one another.

In the context of this case, political fairness is a *state* policy because adopted by the Apportionment Board under its constitutionally-authorized function of reapportioning the state through a *bipartisan* mechanism. Political fairness is a *rational* policy because it provides a means reasonably adapted to safeguarding against the perennial danger in reapportionment of invidious partisan discrimination (gerrymandering). It is indeed a rational policy for all states because it relates directly (and not merely indirectly as does population equality) to the ultimate purpose of reapportionment, *i.e.*, provision of a basis for effective legislative representation. In the United States as in England effective political representation in legislatures is achieved, to all intents and purposes, through the political party system. Parties provide the candidates, and the channels for input into the legislature, whether or not the electoral supporters of a party are formally registered with it or not.[59]

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[59] It follows from this point that the Board quite properly did not focus on registered membership in one party or another as a basis for testing out alternative sets of district lines, which *would* have produced a distortion of the "one man-one vote" concept. It focussed on the actual representation interests of all voters in the state by considering total electoral performance as a check on invidious districting.

Specific recognition of the importance of the political party element in the composition of governmental bodies is found in local government cases supporting the constitutionality of minority representation devices—even to the point of creating limited voting systems. This Court has recently affirmed a ruling holding constitutional the Connecticut Minority Representation statute, which provides for such party representation.[60]

Nor can it be said that the invocation of a political fairness consideration operates to pre-judge an election.[61]

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[60] In *LoFrisco* v. *Schaffer*, 341 F.Supp. 743 (D.Conn. 1972), *aff'd*, 41 U.S.L.W. 3245 (November 6, 1972), the district court held that the state had a legitimate interest in providing local boards with a "significant minority voice, to air and introduce ideas which the majority might not otherwise consider." *Id.* at 750. It was recognized that the statute was grounded implicitly on the assumption that representation is best effected through the major political parties. "The assumption that the only way in which to obtain diverse views is to classify by political party and the view that the party groups are somewhat monolithic, may not be necessarily correct, but this is a permissible and even approximately true perception." *Id.* The effect of the limited voting statute was to guaranty a fixed proportional representation, the minority party securing one-third of the board seats regardless of their percentage in the election. Although a flexible ratio or true proportional representation format might have provided greater mathematical accuracy, the court held that a greater degree of flexibility was permissible in local elections citing *Abate* v. *Mundt*, 403 U.S. 187) so long as supported by a legitimate state interest. In the context of Connecticut legislative reapportionment, the strength of *LoFrisco* is the judicial recognition of fair political representation as a rational state policy which may be actively pursued by devices which reflect political party structure. Any distinction which may be made between local and state elections would not limit the applicability of political fairness as a legitimate state interest, although it may arguably have a bearing on the degree of permissible mathematical deviations.

[61] See discussion of safe districts in Section III-D-3-c, *infra*.

There is an intrinsically volatile quality to the "one man" who casts the "one vote" which we seek to make as effective as possible in representation terms. Voting is not so volatile, however, that we can learn nothing from past political behavior data; broad voting patterns of particular areas tend to be relatively stable. By recognizing such data the Apportionment Board could construct a representation plan which would be a *better* vehicle through which electoral choice may be fairly and non-invidiously channelized than if blind chance were followed.

There is a sharp distinction between good faith avoidance of known obstacles to fair expression of political opinion, and designing districts to slant the next election in favor of one element whether or not it has popular support. The former approach operates to "free-up" the political process by creating districts intrinsically fair to all contestants; the latter approach perpetuates or creates unfair patterns of representation. Responsive to the constitutionally protected interest in free expression an apportionment agency has a duty to avoid district lines which submerge fair expression of political opinion. Population equality tells reapportioners that districts must be equal but many sets of "equal" districts are possible, all with different political effects. The role of a fairness or balance principle, operating as a surrogate for virtually all other suggested reapportionment factors, is to help ascertain where the many possible lines of these "equal" districts may be drawn without slanting the next election unfairly. Political fairness directly reconstitutes, for example, the check on gerrymandering which was one indirectly achieved purpose of Connecticut's prohibition on cutting town lines. Political fairness is also fully compatible with any degree of equal population stringency. It is the *one* state policy which can effectively survive the reapportionment revolution.

If population equality is achieved, the question whether political fairness also has been achieved is a matter for challenge and proof by appellees. The mere fact that knowledge of past voting patterns has been recognized in the construction of the districts conflicts with no federal constitutional principle of reapportionment, absent proof of invidiousness. A federal constitutional policy of invalidating all plans grounded in knowledge of political data would automatically void almost all districting plans now in force under the 1970 census—82 percent of them prepared by the legislators themselves, and 18 percent prepared by partisan ex officio boards, bipartisan boards, or analogous politically-knowledgable agencies.[62]

There cannot reasonably be any federal rule of per se invalidity of reapportionments that rest on awareness of political data, especially if that data is used in a good faith attempt to effectuate a rational state policy of reapportioning on a nondiscriminatory basis as well as an equal basis.

It is the political fairness or balanced aspect of the Connecticut plan, and not merely its strong population equality aspect, that "justifies" the lines being located where they are. Under a mere population equality rule the lines could be located in any number of other places. The political fairness principle reduces the options to an intelligible basis; and that basis goes to the fundamental purpose of reapportionment itself—fair and effective representation in the legislative process achieved by legislative districts which receive and channel the popular will.

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[62] The National Legislative Conference and The Council of State Governments, *Reapportionment in the States* 14-15 (1972).

III. THE CONNECTICUT "EQUAL POPULATION" APPORTIONMENT PLAN INCORPORATING ALSO THE RATIONAL POLICY OF POLITICAL FAIRNESS IS IN NO SENSE A POLITICAL GERRYMANDER EVEN IF ALLEGATIONS OF POLITICAL GERRYMANDERING ARE JUSTICIABLE. NOR IS IT INVIDIOUSLY DISCRIMINATORY UNDER ANY SUBSTANTIVE (NON-NUMERICAL) CRITERIA OF DISCRIMINATORY DISTRICTING; IN ANY EVENT PLAINTIFF-APPELLEES HAVE NOT SUSTAINED THE BURDEN OF PROVING INVIDIOUS DISCRIMINATION UNDER THE FOURTEENTH AMENDMENT

A. THE DISTRICT COURT RULING IN RELATION TO ALLEGED SUBSTANTIVE (NON-NUMERICAL) INVIDIOUSNESS IN THE CONNECTICUT PLAN

The District Court expressed doubt about the justiciability of political gerrymandering per se, but purported to rest its decision on something else. That something else may have been numerical equality per se, *i.e.*, deviations too large and not justified. (Mem. of Dec., Juris. Statement, p. 8a). Alternatively, the ground for decision may have been numerical equality in relation to the political fairness or political balance principle (*id.*, at 10a-11a).

This latter ground in turn seems to rest ambiguously either on the assertion that (1) the use of political fairness considerations increased deviations, although the Record has no factual support for the assertion; or (2) that the use of political fairness considerations, wholly apart from any numerical aspect, may have operated to create districts *substantively* defective in fair representation terms. Specifically the court mentioned "safe" districts. Because the second alternative ground for decision raises a question of non-numerical invidiousness it falls under the rubric of a "gerrymandering" holding, broadly defined. Hence this Part III of the Brief demonstrating that the Connecticut Plan is likewise non-invidious in its non-population aspects is deemed necessary. (See also Mot. to Affirm, pp. 10 and 35, and note the attempted use of political gerrymandering allegations on a purely descriptive basis at pages 13-35, discussed *infra* in Part III-D of this Brief.)

B. THRESHOLD ISSUE OF JUSTICABILITY

At the threshold there is a problem of justiciability regarding the generalized allegations of plaintiff-appellees that apart from any numerical equality issue the Connecticut Apportionment Plan is an invidious discrimination in political terms. Although mentioned in the Complaint (Paragraph 15, Single Appendix, p. 11) little attempt was made at trial to support the allegations, except by indirection by introducing some maps into the Record.

Since *Baker* v. *Carr*, 369 U.S. 186 (1962), it has been clear that allegations of population inequality among legislative districts are justiciable. As this line of litigation has developed, the critical issue which has emerged is ascertaining the point at which population deviations from ideal district size are so insubstantial or *de minimis*, particularly if interrelated with rational state policies serving additional representation values, that no invidious discrimination results under the Fourteenth Amendment. *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Swann* v. *Adams*, 385 U.S. 440 (1967). This Court has had little occasion since 1967 to speak to that question and clarify the meaning of the Fourteenth Amendment in this regard, except in *Hadley* v. *Junior College District*, 397 U.S. 50 (1970) and *Abate* v. *Mundt*, 403 U.S. 102 (1971). In both of these cases an approach was taken consistent with a de minimis concept. Points I and II of the Brief, *supra*, have developed this issue.

Quite different is the question of justiciability regarding the operating effect of legislative districts viewed from a political standpoint, albeit that may be the only aspect of districting ultimately concerning anyone. From the judicial perspective there are critical problems of proof and standards which can be related to specific and administrable constitutional principles.

Pleas of racial unfairness, *i.e.*, political gerrymandering focusing primarily on racial rather than partisan considerations, are concededly justiciable. But the plaintiffs

must show intentional discriminatory purpose and effect, and the absence of alternative non-racial explanations for the district lines. *Whitcomb* v. *Chavis*, 403 U.S. 124, 144, 149 (1971); *Wright* v. *Rockefeller*, 376 U.S. 52 (1964); and *Mann* v. *Davis*, 245 F.Supp. 241 (E.D. Va. 1965), *aff'd sub nom. Burnette* v. *Davis*, 382 U.S. 42 (1965). The justiciability of political gerrymandering focusing on partisan rather than racial considerations (albeit the two may not be easily separable in the North, as the *Whitcomb* opinion indicates) has been a matter of dispute. *WMCA* v. *Lomenzo*, 382 U.S. 4 (1965); *Badgley* v. *Hare*, 385 U.S. 114 (1966); and *see* excellent analysis by Judge Wright in *Sincock* v. *Gately*, 262 F.Supp. 739, 857 (D.Del. 1967). Arguably the conceded justiciability of pleas of political or racial unfairness in multimember district context, which may be simply a special form of gerrymandering, should carry over into single-member districting. *Burns* v. *Richardson*, 384 U.S. 73 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433 (1965). We do not now contest the justiciability of allegations of partisan gerrymandering, whether made in single-member or multimember district context, provided, however, political-partisan gerrymandering, like political-racial gerrymandering, must be proven by the party alleging such invidious discrimination.

C. THE BURDEN OF PROOF IS ON THE CHALLENGERS REGARDING ALLEGED POLITICALLY INVIDIOUS DISCRIMINATION IN A PLAN WHICH SATISFIES NUMERICAL EQUALITY, AND WHICH IS FURTHER SUPPORTED BY A POLITICAL FAIRNESS PRINCIPLE.

In the era of *Baker* v. *Carr*, 369 U.S. 186 (1962), and *Reynolds* v. *Sims*, 377 U.S. 533 (1964), the burden of justifying significant population deviations was allocated to the state. However, once the equal population rule became established and was followed in new reapportionments, the burden of proving substantive representation unfairness in substantially equal districts was allocated to the challenger.

The latter approach is exemplified by such cases as *Fortson* v. *Dorsey*, 379 U.S. 433 (1965), *Burns* v. *Richardson*, 384 U.S. 73 (1966), and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). In the *Burns* case Mr. Justice Brennan said that because population equality was not at issue the lower court was wrong in insisting that the legislature "justify" its proposal. He went on to say that the legislature's reapportionment judgments, assuming a proper population basis, "were subject to constitutional challenge only upon a demonstration that the . . . [apportionment plan] . . . was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." 384 U.S. at 89.

This approach was strengthened and reiterated in 1971 in *Whitcomb* v. *Chavis* and clearly indicated that if a plan is permissible on equal population grounds, any other species of invidious discrimination must be supported with convincing proof, and not merely alleged. The Court said: "[W]e have insisted that the challenger carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements." 403 U.S. at 144. And the Court concluded: "Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less *opportunity* than did other Marion County residents *to participate in the political processes and to elect* legislators of their choice." 403 U.S. at 149 (emphasis added). In short, on the nonpopulation aspect of the case the Court wanted proof of "real-life impact . . . on individual voting power," and the burden was on the challenger to make such proof. 403 U.S. at 146. And the burden is heavy, Mr. Justice White remarking that: "We have not yet sustained such an attack." 403 U.S. at 144.

D. THE POLITICAL FAIRNESS PRINCIPLE USED CONJOINTLY WITH POPULATION EQUALITY BY THE APPORTIONMENT BOARD IS NOT IN ITS OWN RIGHT A "POLITICAL GERRYMANDER" AS APPELLEES ALLEGE; NOR WAS IT PRODUCTIVE OF ANY PROVEN OR UNPROVEN DISCRIMINATION UNDER THE FOURTEENTH AMENDMENT

1. The Confusion Caused by Appellees' Attempt to Skirt the Problem of Justiciability and Proof of Political Gerrymandering by Failing to Separate in Their Argument (1) Political Fairness as a Rational State Policy Supportive of the Population Deviations in the Plan; and (2) Political Fairness as a Decisional Element in Line Drawing Which Allegedly Produced "Discriminations" Unrelated to the Question of District Population Deviations.

The political fairness principle enters this litigation in two quite distinct ways.

First, if the population deviations achieved by the Apportionment Board, standing alone, are not presumptively constitutional, they become presumptively constitutional when placed in the context of the corollary rational policy of political fairness embodied in the plan. Parts I and II of this Brief deal with the population deviation question, and the relation to it of the political fairness principle.

There is no evidence at all that the political fairness principle increased the small deviations that do exist. We have also demonstrated in Parts I and II that a political fairness spirit should guide the drawing of a population-based plan, especially a tight equal population plan. A political fairness spirit is needed as a check on the many districting options (some very unfair politically) which arise as a necessary adjunct of the districting freedom associated with a stringent equality rule—*e.g.*, freedom from a state anti-town-line-cut policy. In Connecticut the town line policy cannot even be closely achieved and at the same time achieve substantially equal districts.

Second, if the population deviations *are* presumptively constitutional the question remains whether the plan in operation, as influenced by the political fairness principle or any other drafting guide it embodies, causes invidious

discrimination against some identifiable body of voters. This is a question going to political effect, unrelated to population equality per se. Hence a question of justiciability arises, and in any event challengers have a heavy burden of specific proof (see discussion in Part III, Sections B and C, *supra*).

On this branch of the case it is not enough simply to point out in laundry list fashion, over a sequence of 22 pages, that a number of town boundaries were cut, including a few to improve political fairness, that some district shapes are asymmetrical or noncompact, and that there are safe districts (Appellees' Mot. to Affirm, pp. 13-35). No matter what may be the causes of such cuts, shapes, and safe districts, this is merely description. Indeed, the described elements are found in reapportionment plans in all states. Conceivably these elements in some situations may be possible indicia of unfair play, *i.e.*, political gerrymendering, but they are meaningless unless supported by actual proof of unfair play. Such proof is extraordinarily difficult in a situation where a policy of political fairness has played such a large role. It is devilishly difficult to make a case for unfairness out of a policy of fairness.

What appellees must show on this branch of the case, and have not even purported to show, is "real-life impact . . . on individual voting power." *Whitcomb* v. *Chavis*, 403 U.S. at 146. Instead what appellees have done (*e.g.*, Mot. to Affirm, pp. 13-35) is to smuggle in various facets of a possible political gerrymandering claim under the masquerade of extending their discussion of population equality. Population equality and the relation to it of the Apportionment Board's political fairness principle is one distinct issue.

A wholly separate issue is the question of various non-population-equality impacts of the political fairness policy and whether these impacts cause an individious discrimination *against the particular voters who are plaintiffs-appellants here.* Any voter in an allegedly overpopulated dis-

trict *can* sue to challenge population inequality in districts, *Baker, supra,* but claims of particularized discrimination in districting can be made only by the voters specially affected. *Wright* v. *Rockefeller,* 376 U.S. 52 (1964).[63] We do not find in this Record even the beginning of such particularized discrimination proof as was attempted, albeit unsuccessfully, in *Wright, supra,* and *Whitcomb* v. *Chavis, supra.*

2. The Political Fairness Principle Was Used by the Apportionment Board as One Possible Defense Against a Repetition of the Connecticut Minority Election of 1970 Which Was a Gerrymander in Result Whether Or Not Planned.

Honoring the population equality principle in legislative districting, when that principle is employed without regard to any of the political realities of a state, gives no assurance that the goal of majority rule will result. There have been instances of election of minority legislatures, *i.e.,* a majority of the seats elected by a minority of the statewide legislative vote, under equal population reapportionment plans. When this happens "one man-one vote" has a hollow ring. Use of a political fairness or balance principle by reapportioners, as in Connecticut, is one means of trying to avert such a disappointing consequence of the reapportionment movement. The balance principle does not guarantee against such an eventuality because politics is volatile; it does make use of available data to devise districts which will avoid the worst possibilities of such unfairness.

Examples of minority government include Connecticut in 1970 when the Republicans polled a majority of the statewide legislative vote for the lower house, and arguably for both houses but the Democrats captured a majority of the

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[63] *See also* Note, "Wright v. Rockefeller and Legislative Gerrymanders: The Desegregation Problems Plus a Problem of Proof," 72 *Yale L. J.* 1041 (1963).

seats in each house;[64] California in 1966 when the Democratic party captured both houses of the legislature with a minority of the statewide legislative vote; New Jersey in 1966 when there was a similar occurrence regarding the state's congressional delegation.

3. The Minor and, on This Record, Essentially State Law Issues, of: District Shape, Town Line Cuts, Safe Districts, Incumbency

Either the appellees at trial, or the District Court in its Memorandum of Decision, looked askance at the following allegedly descriptive features of the Board plan, as possible grounds for contesting its constitutionality; (a) district shape, (b) excessive town line cuts, (c) safe districts, (d) incumbency. Safe districts and incumbency were specifically mentioned by the District Court, (Mem. of Dec., Juris. Statement, p. 7a), but neither of these were related to the population deviations in the Board plan, and there were no specific findings of discrimination against particular voters.

Any one of these issues could conceivably give rise to a state law issue, although as the District Court noted neither the Federal nor Connecticut Constitutions require legislative districts to be compact (Mem. of Dec., Juris. State-

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[64] In Connecticut in 1970 the Democrats captured a two-seat margin in the senate, 19 to 17, with a minority of the statewide senate vote, the Republican popular vote exceeding the Democratic vote by 17,827 votes. And arguably the Democrats captured the lower house also in 1970 with a minority of the vote, yielding a completely minority legislature. This latter statement is supported by the fact that in three districts Democrats ran unopposed, and treating the Republican vote there as absolute zero, the Democrats had a narrow statewide popular vote plurality of approximately 5,000. However, if the average Republican town vote in those districts be added to the Republican statewide house totals, to better reflect the actual feeling in the state, the slight Democratic popular vote plurality for the lower house turns into a deficit, and a minority victory. See Deposition of James F. Collins Single App., pp. 61-63, and *1971 Connecticut Register and Manual.*

ment, p. 7a). As potential state law issues they all were introduced in the state Superior Court mandamus proceeding in August, 1972, and pressed in the Connecticut Supreme Court on appeal. However, the Superior Court nevertheless issued the requested mandamus putting the Apportionment Board plan into effect for the 1972 election. *Miller* v. *Schaffer, Secretary of the State.* No. 173606 Superior Ct. Hartford County Filed July 27, 1972. The Connecticut Supreme Court affirmed, and reserved jurisdiction to await this Court's ruling on the federal issues. *Miller* v. *Schaffer,* No. 7238, Supreme Court, October 17, 1972.

None of the above issues is a federal issue under the Fourteenth Amendment *unless* either (a) directly productive of excessive population deviations which have not been shown, or (b) proven to be an element of political gerrymandering, *i.e.,* particularized invidious discrimination against identifiable voters, which likewise has not been shown. We will nevertheless comment on each of these alleged elements of the State Plan to show that even if they are factually descriptive of certain aspects of the State Plan they neither constitute proof of political gerrymendering nor are of independent constitutional concern.

(a) District shape, compactness

There is no succh thing as a "natural" shape for a legislative district, nor for that matter for a city, a county, a town, or an irrigation district. The relevant question is: Is voting power and fair representation of people invidiously affected? Compactness, or shape, as such, is irrelevant in answering this question.

District line drawing choices, selected from the almost infinite number of possibilities as to where lines could be placed (particularly under an extremely tight numerical equality rule), involve consideration of population equality, geographic and political subdivision features, and especi-

ally the unpredictable and changing residence patterns of the people. This last element goes to the crucial factor of political fairness or unfairness in districting. There is no "neutral" line. Noncompactness could be the only way to provide even minimal representation of a scattered minority, racial or political. Compactness can be defined in such inconsistent ways as pleasing symmetry of shape, or a population center of gravity principle designed to minimize travel distance for each resident to the population center.[65]

There is no federal constitutional requirement of compactness, let alone an agreed constitutional definition of compactness. There is recent authority for the proposition that compactness may be ignored in pursuit of a population equality purpose. *Kirkpatrick* v. *Preisler,* 394 U.S. 526, 535-36 (1969). As already shown, Connecticut has not only achieved substantial population equality under the rule of *Reynolds* v. *Sims,* it has achieved near perfact equality (maximum deviance of less than 790 persons) in the light of the census units averaging approximately 1,100 persons which were available to the Board for use as reapportionment building blocks to create assembly districts averaging 20,000 persons.

(b) Town line cuts

Almost two-thirds of the Record in this proceeding is devoted to discussion and introduction of exhibits regarding town line cuts. However, town line cuts are irrelevant to both facets of the federal population equality issue in this case, i.e., whether presumptive constitutionality was achieved either by the deviations standing alone, or by the deviations in the context of the corollary rational policy of political fairness embodied in the plan.

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[65] Schwartzburg, "Reapportionment, Gerrymanders, and the Notion of Compactness," 50 *Minn. L. Rev.* 443 (1966); Crond, Inc., *REDIST: Program Description and User Manual* (National Municipal League, 1967).

Likewise, the cutting of local political unit lines to comply with the overriding federal equal population principle has never been deemed to constitute sufficient proof of political gerrymander. See *Badgley* v. *Hare*, 385 U.S. 114 (1966) (refusing to review a claim of political gerrymandering in Michigan related to county line cuts.) Even if the cuts were theoretically more numerous than would have been required to comply with the federal standard (which is a principle and not a mechanical formula), there would still be no proof of invidious discrimination; nor could there be such proof when the cuts are pursuant to a political fairness or balance principle.

All parties agreed that any reasonable interpretation of the equal population rule would require a large number of town line cuts in Connecticut. (Cross-examination of Mr. Vocelli, expert witness of plaintiff, Third Trans., Single Appendix, pp. 246-47). The State Plan cuts 47 towns of the 169 towns and results in 78 segments, the latter defined as a portion of a town in a district not wholly within that town (Mem. of Dec. Juris Statement, p. 5a). The three plans introduced by plaintiff-appellees which reduced the town line cuts, but not significantly, all involved increasing the population deviations.[66]

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[66] The following colloquy at trial between appellees' counsel Robert Satter and Apportionment Board Member George A. Saden is instructive on the Board's policy of keeping deviations as low as possible, and appellees' ambivalent position on the question whether the deviations were too high or really too low:

> Q. (Satter): Are you familiar with the fact that if you raise the percentage deviation above the plus or minus four percent that you could reduce the number of towns which were—town lines which were cut and the number of segments of towns, segmenting of towns? . . . A (Saden) . . . My only comment that I can make on that, Mr. Satter, is that it seems to me that would be flying in the face of the one man, one vote principle if you tried to increase deviations. I thought that the primary and essential factor behind the whole reapportionment scheme is to keep the deviations as low as reasonably possible. Trial Trans., Single App., pp. 40-41.

The figures for these plans are as follows: Pl. Ex. 20—population deviation, +4.02% and —4.08%, 36 towns cut, 49 segments; Pl. Ex. 21—population deviations, +5.88% and —5.97%, 31 towns cut, 39 segments; Pl. Ex. 22—population deviations, +7.43% and —7.32%, 27 towns cut, 35 segments. (See Trial Trans., Single App., pp. 226-229.) Thus even a policy of almost doubling the population deviation, from the 3.9% of the State Plan for House to 7.43% (Pl. Ex. 22), only reduces the number of towns cut from 47 to 27.

The one appellee's plan which has lower population deviations than the State Plan has more town lines cut than in the State Plan (Pl. Ex. 23, *id*, at 230). The figures for this plan are: population deviations, +1.6% and —1.01%, 58 towns cut, 88 segments.

Some additional appellees' exhibits on town lines seem to be straining at the trivial so far as federal constitutional issues are concerned. All of this material was also presented in state court after this Court granted a stay of the District Court judgment, but did not deter the state Superior Court from placing the State Plan in operation for the 1972 election, or the Connecticut Supreme Court from affirming. *Miller* v. *Schaffer*, No. 173606, Superior Ct. Hartford County, August 23, 1972; *aff'd*, Supreme Court of Connecticut, No. 7238, October 17, 1972. These exhibits purport to show that in a few isolated instances it would be possible to redraw certain district lines so as to eliminate a town line cut, or a segment, while staying inside the State Plan's maximum district deviation of 3.9%.[67] However, appellees do not and cannot claim that the suggested revised lines in these areas keep the population deviations, in these areas, as low as in the State Plan.

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[67] Pl. Exs. 5, 5a, 6, 6a, 7, 7a; Trial Trans., Single App., pp. 146-48, 204-09.

There is no standard, except political fairness, against which to judge the imponderables of (1) which town to cut, (2) how to cut it, and (3) given the non-mechanical nature of the federal population principle, how many towns to cut. The Supremacy Clause (Const., Art. VI, § 2) gives no guidance whatsoever on these practical questions. Arguably, if every town line in the state were cut, one might surmise that a state policy against town line cuts had been unnecessarily and unreasonably overridden. On the intermediate facts of the Connecticut case there is no workable standard of judgment to invoke, especially because town line cuts are only one of several elements to be considered in working out a reapportionment plan to achieve the *Reynolds* v. *Sims* goal of "fair and effective representation" in state government. 377 U.S. at 565-66.

(c) "Safe districts"

"Safe districts" are an endemic feature of legislative representation in the United States as they are in all democracies employing a district rather than proportional representation system.[68] Indeed, under proportional representation something even stronger than a "safe district" result eventuates, insofar as the political parties place their most senior incumbents at the top of the ballot list to insure that the core of the party leadership is always re-elected. [69]

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[68] See, *e.g.*, the comments and citations in Polsby, ed., *Reapportionment in the 1970s* 4, 5, 31, 149, 290 (1971). *See also* Sokolow, "Legislative Reapportionment and Party Competition in California, Institute of Governmental Affairs, University of California, Davis (1969); Campbell, et al., eds., *Elections and the Political Order* 202 (1966). See Mayhew, "Congressional Representation: Theory and Practice in Drawing Districts," in Polsby, ed., *Reapportionment in the 1970s*, 265, 276 (1971).

[69] Duverger, *Political Parties* (1954).

The District Court's opinion (Mem. of Dec., Juris. Statement, p. 7a) notes with apparent distaste the existence of "safe" and "swing" districts in the Apportionment Board's plan. No proof in the Record was cited, however, which tended to establish (1) that the Board's policies and plan produced a greater number of these districts than any other plan presented, (2) that the existence of these districts was at all a function of the minimal population deviations which exist, or (3) that the "safe" or "swing" districts were intended and did contribute to a political gerrymander aimed at a particular group of voters.

The District Court uncritically uses the term "safe district" as an epithet of opprobrium without realizing that an abundance of such districts is inevitable in any single member redistricting plan, except for the hypothetical case where voters allied with the contending political parties are spread absolutely evenly across the entire state. The fact of residential clusters of voters with similar political affiliations make the creation of districts with predictable election day performance inevitable.

If the supporters of political parties are *not* evenly spread and live in ascertainable clusters, there are three conceivable ways to go about dealing with the "safe district" issue. Initially, a determination can be made that there will be no "safe" seats, at least to the extent that past performances indicate that the strengths of the contending parties are not greatly disproportionate. This would be accomplished by consciously structuring each district so as to place within it the same number of supporters of each party as are placed in every other district. Very strange shapes would necessarily result, as might noncontiguity. All districts would thus be alike in balanced composition, *i.e.*, in each the vote would be proportional to the statewide strength of each party. In such a scheme, a statewide total for one party of 52% would mean a 52% majority for that

party in every district, with the result *not* that the party would receive 52% of the seats in the legislature, but that the party would receive *every* seat. See Single Appendix at 265.

A second approach would be ostrich-like and would ignore "safe" or "swing" seat possibilities. In theory, the apportioners would disregard the anticipated political effect of the lines they drew, relying instead solely on such considerations as compactness, contiguity and minimization of cutting of town lines, as well as the equal population principle. The inevitable multiplicity of district line alternatives, each possibility equally complying with the foregoing criteria, would be resolved by a coin toss or some other equally arbitrary device. "Safe" and "swing" districts and political favor, would still eventuate, because of partisan residence patterns but they would be known only after the plan was drawn.

The third alternative, adopted by the Connecticut State Constitution when it created a bipartisan Apportionment Board, is to subsume the "safe" versus "swing" district argument under the central reapportionment purpose of political fairness. The Board now has implemented the state constitutional mandate. Past voting performance, which is another way of expressing political residence patterns, indicate that in Connecticut each party has a core of approximately 60 safe seats in the House. The resultant Apportionment Board plan, based on a concern for political fairness and avoidance of minority elections like 1970, reflects that fact (Mem. of Dec., Juris. Statement, p. 7a), and then simply tries to avert the possibility of unfairness and minority elections by dealing as fairly as possible with the swing districts. Of course, given voter volatility and special circumstances, "safe" and "swing" districts are merely elements of prediction, and not hard and fast guarantees. The overriding purpose is to reapportion in such

a way that a party's aggregate of seats in the legislature will in some measure reflect that party's acceptance by the statewide electorate. This is the essence of responsiveness to the popular will in electoral politics. As Chief Justice Warren said in *Reynolds* v. *Sims:* "[I]t would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators." 377 U.S. 513 at 565.[70]

The acid test for safe districts is a record of continued electoral success for a given party in a given district. In Connecticut the record of state legislative elections of 1966, 1968 and 1970 shows that of 36 senate districts, 18 were carried by the Democrats in each election, 10 were carried by the Republicans in each election, and 8 were swing districts. As a policy matter there are differing views on the merits-demerits of safe and swing districts, and the optimum proportion of each. The former produce stability, experience (which may make oversight of the executive more effective), and continuous representation of stable communities of interest, *e.g.*, an ethnic constituency. The latter produce more sensitivity to even modest shifts in popular mood, more turnover, more interparty competition. They may also operate to virtually wipe out the weaker party, at least in terms of legislative seats, in landslide election situations, with resultant over-representation of the stronger party.

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[70] Appellees have criticized appellant's use of this quotation (Mot. to Affirm, p. 32). To be sure, in *Reynolds* the precise issue was gross population malapportionment creating rural-urban imbalance in legislative voice. But can it be hypothesized that the *Reynolds* Court was merely purporting to substitute one kind of potential minority rule for another? Was *Reynolds* concerned only with form and not with substance? Hardly so, because the fundamental goal was staked down as being "full and effective participation by all citizens in state government." 377 U.S. 565. The word "effective" cannot be ignored.

To speak of safe districts as "locking in" voters, as did the District Court (Mem. of Dec. Juris. Statement, p 11a), adds nothing to the constitutional argument. As has been demonstrated, all districting systems, unlike proportional representations systems, "lock-in" voters by the mere interface of districts with uneven "political residential" patterns. To "un-lock" locked-in voters would require extensive "political structuring" of the very sort objected to by the District Court in this case. In conclusion, as a federal constitutional matter there is no basis for mandating either a safe or a swing district policy or intervening in a state's political choice *unless* invidious discriminatory intent and effect can be demonstrated. These would be matters of pleading and proof of which this Record is devoid.

(d) Incumbency, i.e., preexisting distribution patterns in political representation

The District Court mentioned in passing, but again without a causal link either to population deviations or to invidiously discriminatory effects in the political gerrymander sense, that in a few isolated instances in district creation some "accommodation" was made on behalf of an incumbent (Mem. of Dec., Juris. Statement, p. 7a). Generically, this is simply a variation of the "safe district" argument, *supra*, and raises questions of political *representation policy* rather than *constitutional concern*. There are only isolated references to incumbency in the Record (*e.g.*, one of the few specific references in the Record is: Trial Trans., Single Appendix, p. 245).

As this Court observed in *Burns* v. *Richardson*, 384 U.S. 73 (1965), the minimizing of contests among incumbents (which is an even stronger protective policy than merely perpetuating some incumbents as part of a political balance spirit) "does not in and of itself establish invidiousness." 384 U.S. 73, 89 n. 16. This Court recently reiterated this *Burns* dictum in *Ely* v. *Klahr*, 403 U.S. 108, 112-13, n. 5 (1971), and thus avoided endorsing the incumbency lang-

uage of the Arizona federal district court. In *Ely* the lower court had invalidated a reapportionment plan on several grounds, including population inequality, prevention of contests between incumbents, and priority to safe districts—of which policies, however, were employed in a political fairness or political balance spirit. This Court's affirmance can rest on the population inequality ruling alone.

The most clear-cut example in the Record of aid to an incumbent (made at the request of the Democratic-selected Board Member, Judge Leo Parsky, and benefiting if at all the plaintiff-appellees' interest in the apportionment) was to "balance" the district of Ruby Cohen more in his favor (Trial Trans., Single Appendix, pp. 244-245). In the outcome, however, Mr. Cohen was defeated in the 1972 election under the Board plan. This fact illustrates that a policy of political fairness, (whether or not reflected in some supposedly "safe" districts and alleged perpetuation of some incumbents) does not predestine the outcome of an election. Actual unfairness and the danger of minority government is minimized, but political volatility remains.

More important as indicating the fundamental irrelevance of incumbency in the formation of the Board's plan is the fact that in forming the lower house (which was the more difficult task because of the larger number of districts), the Board at the outset cut the size from 177 to 151. (Dep. of James F. Collins, Single App., p. 114). This act had a devastating effect on incumbents. But it was done because use of 151 districts best accomodated the fundamental purpose of achieving close population equality (within the constraints imposed by the 1,100 persons average size of the census units used as building blocks), while at the same time attempting to minimize the number of town line cuts without increasing population deviations.

Mere presence of overt or covert consideration of an incumbency factor, absent any adverse effect on population equality or other proof of invidious discrimination, does

not warrant automatic invalidation of the plan under any federal constitutional principles thus far announced by this Court for state legislative reapportionment. The fundamental rule of *Reynolds* v. *Sims* is that some nonpopulation factors can be and indeed should be considered *provided* the effect is not to deviate from the basic rule of substantial population equality, 377 U.S. at 577-81, supported with regard to incumbency by the above quoted dictum of *Burns* v. *Richardson* and *Ely* v. *Klahr, supra.*

E. FAR FROM BEING AN INVIDIOUS POLITICAL GERRYMANDER, THE POLITICAL FAIRNESS PRINCIPLE UTILIZED CONJOINTLY WITH POPULATION EQUALITY IN THE PREPARATION OF THE CONNECTICUT APPORTIONMENT PLAN IS A MEANS REASONABLY ADAPTED TO AVERT A POLITICAL GERRYMANDER AT THE OUTSET

In the instant case, plaintiffs-appellees offer no proof at all of invidious discrimination caused by either political-racial or political-partisan gerrymandering. Instead the essence of the objection, which has almost an Alice in Wonderland quality in the light of conventional definitions of gerrymandering, is that even a benevolent consideration of past election results and other relevant political data is a species of impermissible gerrymandering. And they insist that this is so even if the purpose of recognition of such data is to try to achieve fairness in political representation, and to avoid a situation of political imbalance, *i.e.*, a situation of unequal political opportunity for all voters for the respective party candidates. We are talking about the relation of the general electorate to the ballot, which for all practical purposes contains only party candidates. Admittedly the Apportionment Board sought to avoid districting patterns under which, in the light of known political factors, it could be predicted that there was little prospect that voters for a given set of party candidates could not elect a fair number of legislators, *i.e.*, a number roughly proportional to the voter group's general strength in the

state.[71] Because minority process is certainly not due process, why should there by any constitutional infirmity in utilizing such political data to identify likely political pitfalls, and then devising districting patterns to avoid such pitfalls? Should not such knowledge as exists be used? Indeed, would it not be a derogation of responsibility for a bipartisan board not to consider political fairness and strive for the *Reynolds* goal of fair and effective representation?

The political system is of course too volatile for the Apportionment Board, or any other agency, to guarantee full, proportionate, representation without abolishing districts and going all the way to a proportional system of election.

The phrase "political balance" which the District Court repeatedly uses to characterize one of the Apportionment Board's three policies (the other two being population equality and minimization of cutting town lines) does not adequately encompass the personal constitutional values served by the Board's action. The election data used by the Board includes the vote of all voters, whether registered party members or not, because it is the general electorate which is dispositive on election day. Therefore, functionally viewed and related to personal values of "one man-one vote," the Apportionment Board's action, using readily

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[71] Plaintiffs' counsel's argument, when not bogged down in the town line question, was consumed in pointing to the political fairness principle of the Board, but not to showing (a) that it caused any demonstrable increase in population deviations, (b) that it caused any invidious discrimination or decrease in political opportunity of voters, (c) that there was any other plan which would be fairer or provide more political opportunity. And plaintiffs' counsel admitted that blind pursuit of population equality will not avoid political gerrymandering, i.e., there "can be equality and still be political gerrymandering." (Trial Trans., pp. 165-66, Arguments of counsel, not printed in Single Appendix.)

available and relevant data, was an attempt to devise districts which would create fair political opportunity for all voters in selecting public office holders.

In short, what the Apportionment Board in Connecticut did, in accord with the *Reynolds* v. *Sims* purpose of fair and effective representation was to maximize opportunities for effective voter access to the political system by avoiding potential conditions of invidious discrimination which were revealed when past political performance was applied to tentative sets of new districts.

Especially instructive in this connection is the comment of former Chief Judge William J. Campbell of the United States District Court for the Northern District of Illinois, and one of America's most experienced reapportionment judges. In 1965 Chief Judge Campbell worked out a generally approved reapportionment of the Illinois senate, (and subsequently a congressional redistricting, too) by an ad hoc bipartisan pretrial conference directly analogous to the operation of the Connecticut Apportionment Board. *Germano* v. *Kerner,* 247 F. Supp. 141 (N.D. Ill. 1965); see also *People ex rel. Scott* v. *Kerner,* 211 N.E. 2d 736 (1965); *Kirby* v. *Illinois Electoral Board,* 251 F. Supp. 908 (N.D. Ill. 1965). At a press conference at the successful conclusion of his efforts he responded as follows to questions concerning the propriety of considering political data:

> "I certainly did; it's a necessary part of trying to work out a fair and balanced set of districts, from the standpoint of the interests of each political party. But there is crucial difference between considering political factors in an attempt to do justice to each party in regard to provision of safe and swing districts, and a one-sided partisan political gerrymander for the advantage of one party alone." *Democrat Representation* 312-13.

It is common knowledge that in the minority of states where there is no provision for a bipartisan commission the

starting point on reapportionment is a marshalling of relevant political data as well as bare census data. The process may be overt or covert, and if one political party controls the legislature and governship the districting process can be carried through on behalf of one political party without any counter-check, other than the uncertain possibility of subsequent judicial review of charges of political gerrymandering. The bipartisan commission with tie breaker, by contrast, is a promising attempt to institutionalize fairness in the very process of reapportionment. And yet the District Court ruling below puts this whole new development in question. For how can a bipartisan commission operate, as hoped, to ameliorate partisanship unless it is conscious—overtly conscious—of political realities?

It is impossible to de-politicize an intrinsically political process, nor is that the purpose of *Baker* v. *Carr* and the resultant reapportionment revolution. The purpose of *Baker* and its progeny is to terminate population malapportionment by requiring substantial population equality in formation of legislative districts. Courts can no more take politics out of a process which is the core of the American political representation system than King Canute could still the waves. Indeed, the approach of the District Court ruling below seems to point in the direction of reapportionment by lottery (for how else could we be sure that no political data were considered), rather than in the direction approved by the Connecticut Constitution of a good faith and even bipartisan effort to create broader and fairer conditions of political opportunity, which necessarily must include some recognition of political data.

As one astute member of an apportionment commission phrased the matter a few years ago:

> "Every plan has a political effect, even one drawn by a seventh grade civics class whose parents are all nonpartisans and who have only the United States census

data to work with. Even though they drew such a plan with the most equal population in districts, following the maximum number of political subdivision boundaries and with the most regular shapes, it could very well result in a landslide election for a given political party." [72]

The plaintiffs' position below on this point, which the District Court mistakenly adopted, accords with no known definition of gerrymandering. All definitions focus on invidious purpose or effect or both, designed to misrepresent rather than to better represent the voting strength of voters supporting particular candidates or causes.[73] The gerrymander deals with "partisan or factional advantage," [74] to secure for the gerrymandering faction a voting strength in the legislature they could not secure at the polls. The evil of the gerrymander is that it turns the structure back upon itself: it structures representation so that some faction will not receive its fair share of representation. Clearly, then, to structure representation with an eye to "fairness" is to do the one thing that best assures against a gerrymander.

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[72] A. Robert Kleiner, Democratic Member of Michigan Reapportionment Commission, National Municipal League Speech, 1966, quoted in Dixon, *Democratic Representation:* Reapportionment in Law and Politics 436 (1968).

[73] Key, *American State Politics* 64-65 (1956); Hacker, *Congressional Districting* 54 (1964).

[74] Baker, "Gerrymandering: Privileged Sanctuary or Next Judicial Target?" in Polsby, ed., *Reapportionment in the 1970s* 121 (1971).

IV. THE REAPPORTIONMENT DEVICE OF BIPARTISAN COMMISSION (OR BOARD) WITH TIE BREAKER FOUND IN CONNECTICUT AND SEVERAL OTHER STATES IS AN INNOVATION WHICH NOT ONLY COMPORTS WITH ANY DEGREE OF POPULATION EQUALITY WHICH MAY BE CONSTITUTIONALLY MANDATED BUT ALSO INSTITUTIONIZES A PROCESS FOR EXPEDITIOUS AND FAIR DISTRICTING WITH MINIMUM NEED FOR JUDICIAL INTERVENTION; NOR WERE THERE ANY INFIRMITIES IN THE ACTUAL OPERATION OF THE CONNECTICUT BOARD —A QUESTION RAISING ONLY A STATE LAW ISSUE ABSENT PROOF OF (1) IMPERMISSIBLE AND UNJUSTIFIABLE POPULATION DEVIATIONS OR (2) A PROVEN INVIDIOUSLY DISCRIMINATORY EFFECT, IN NON-POPULATION TERMS, ON PARTICULAR VOTERS OR GROUPS OF VOTERS

A. THE BIPARTISAN COMMISSION WITH TIE BREAKER DEVICE HAS UNIQUE VIRTUES AS A METHOD TO DISCHARGE THE APPORTIONMENT FUNCTION, AND NECESSARILY INCORPORATES A POLITICAL FAIRNESS PRINCIPLE BECAUSE THE PURPOSE OF ITS CREATION IS TO AVOID UNFAIRNESS IN THE CONSTRUCTION OF THE PLAN ITSELF

Courts can police the population equality component of reapportionment and redistricting, but a bare numbers approach is consistent either with grossly unfair or fair districting practices. There are severe limitations on what courts can do concerning the crucial districting choices which determine the operating fairness of a reapportionment plan, even if political gerrymandering be deemed justiciable under a severe burden of proof. The states, however, through legislative and state constitutional processes, can experiment with ways to curb unfair partisan impulses, whether covert or overt. One of the most promising recent developments in the states, which has received frequent praise in the literature of reapportionment,[75] is

[75] O'Rourke, Reapportionment: Law, Politics, Computers, AEI Domestic Affairs Study No. 1, pp. 96-97 (1972).

the device of bipartisan commission with tie breaker.[76] And it is implicit that such a commission, to be effective and perform its intended mission, cannot operate in politically-blind, chance fashion.

The bipartisan commission device institutionalizes a process whereby:

(1) An outright partisan apportionment by one party may be avoided;

(2) Consideration of political fairness may be identified and brought into the open in the process of districting (*i.e.*, "representation" which the dissenters in *Baker* v. *Carr*, 369 U.S. 186 (1962), feared would be ignored);

(3) Reapportionment may be accomplished expeditiously by a fixed deadline without repetitive court orders;

(4) A reapportionment plan will emerge which will be entitled to some presumption of constitutionality by the very nature of its creation, subject always to corrective judicial review if there be proof of invidious intent or effect, short-changing the votes or effective representation of identifiable elements of the voting population;

(5) As many organized political interests are incorporated into the reapportionment process as is feasible, in view of the traditional American district system of legislative representation, which tends to produce a two-party system. Third party representation in creating the apportionment agency can be recognized if desired, and is so recognized in the formula incorporated in the Connecticut Constitution. It would not be feasible, of course, to have either the legislature or the apportioning agency mirror the detailed clusters of interests in the population without going all

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[76] In some states the new bipartisan commission with tie breaker device replaces the legislature as the reapportionment agency: N.J. Const. Art. XI, §5 (1966); Pa. Const. Art. II, §§ 16, 17 (1968); Hawaii Const. Art. III, §§ 2, 4, as amended (1968). In others it exists as a backstop in event of legislative (or legislative-governor) deadlock: Conn. Const. Art. III, § 6 (1965); Ill. Const. Art. IV, § 3 (1970).

the way to the European system of proportional representation. In short, the population equality principle, satisfied here, and a rational state policy of political fairness, taken together, encompass all relevant representation values. Operating together, the two principles are the very antithesis of invidious political gerrymandering. A plan so devised is entitled to a strong presumption of constitutionality, and thus safeguards the judiciary against unnecessarily becoming enmeshed in political litigation.

B. THE OPERATION OF THE CONNECTICUT APPORTIONMENT BOARD IN NO WAY ADVERSELY AFFECTED THE VALIDITY OF THE BOARD'S PLAN

In the latter part of their Motion to Affirm (pp. 36-39), appellees make a number of observations on the operation of the Apportionment Board, explicitly identifying some Republican (the legislative minority) political party affiliations, and raising other questions seemingly grounded on dislike of the final plan from a partisan ("Democratic") standpoint. Rather than cast their argument in such forthright terms, however, appellees have characterized themselves as "citizens and voters who assert their individual and personal rights under the Equal Protection Clause." *Id.* at 36. This characterization is incomplete because it fails to mention the Democratic interests in the suit through the plaintiff-appellees and their counsel. (*See,* Statement of Facts, Events After District Court Judgment, note 4, *supra.*)

In this setting, therefore, the past political affiliations of Judge Saden and Mr. Collins, which appellees dwell on at length (Appellees' Motion to Affirm, p. 37) while disregarding the prior affiliation of Judge Parskey with the reapportionment interests of the Democratic party (Single App., p. 38), do not appear to be pernicious as appellees have sought to make them. It should come as no surprise that board members and aides had political party affiliations, because the Apportionment Board is specifically set up as a bipartisan board, not nonpartisan; the purpose is balanced partisanship in the selection of the Board and its

third member, and in opportunities for negotiation and publicity.

It is noteworthy that in their attempted attack on the operation of the Board, the appellees do not, and cannot, allege that the Board members were improperly selected or that one or more of the Board members was prevented from participating. Both Judge Saden and Judge Parskey were selected by the legislative leaderships of the minority and majority parties as mandated by the state constitution. Further, it is clear that Judge Parskey prepared for Judge Saden a list of six names acceptable to Judge Parskey as the third or tie-breaker member, and that Judge Saden selected one of the six, Supreme Court Justice Thim (see Section II-C-1, *supra*, text accompanying note 49). Accordingly, there was no infirmity in the processes by which the three Board members were selected.

The processes were similar to those used in setting up the Pennsylvania bipartisan commission—except that there the tie-breaker was appointed by the state Supreme Court. The plan produced by this analogous Pennsylvania process was sustained by the state Supreme Court and this Court dismissed the appeal. *Commonwealth ex rel. Specter* v. *Levin*, 293 A.2d 15 (1972), *appeal dismissed sub nom. Specter* v. *Tucker*, —— U.S. ——, 41 U.S.L.W. 3181 (October 10, 1972) *for want of a substantial federal question.*

With respect to the operating procedures of this small three-man Board, appellees try to recast the extensive effort of Judge Saden (aided by Mr. Collins) into the basis for a claim that they not only worked on plans for each house (allegedly favoring the Republicans) but then somehow overcame Judge Parskey and forced their handiwork on Justice Thim at the eleventh hour. What appellees failed sufficiently to explain, however, is that after preliminary work and discussion on competing plans for the senate and after a vote taken on the senate plans where Judge Parskey was outvoted, Judge Parskey withdrew from further active participation. Accordingly, a plan was completed by Judge Saden for the lower house which re-

ceived Justice Thim's concurrence. Judge Parskey dissented, but filed no alternative plan nor any detailed critique of the Board plan. In this regard, there is no truth to appellees' assertion (Appellees Motion to Affirm, p. 36) that "Justice Thim . . . had no choice but to sign it." Such a statement demeans Justice Thim. First, no one forced him to do so, second, he had ample opportunity to contribute to the policies of population equality and political fairness, and third, no other plan was presented by Judge Parskey or anyone else.

Because there was no demonstrated invidious districting at the expense of one party, the mere fact of party affiliations of Board members has no more significance than the party affiliations at the two prior stages which failed to reach agreement on a districting plan—the failure to get a two-thirds vote in the legislature, and the failure to get a three-fourths vote in the bipartisan legislative commission. (See Section II-C-1, *supra.*)

It is significant that appellees do not follow up their criticism of the operation of the Apportionment Board with any proof of particular instances of invidious discrimination. The political fairness principle, used by the Board as a corollary to the preeminent population equality principle, was itself in accord with the fundamental antigerrymandering purpose of Connecticut in creating a bipartisan mechanism for apportionment.

The composition and operation of bipartisan apportionment boards do not present a cognizable Fourteenth Amendment claim absent proof of invidous discrimination. Here there is no proof of discrimination in the selection process, the operation, or the result.

USION

For the reasons sta[e], which demonstrate that the Connecticut state legi[reapportionment plan does not violate the United St[stitution, the judgment of the court below should b[ed and the case remanded to the District Court wi[ion to enter an order dismissing the complaint of s-appellees.

Re[y submitted,

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APPENDIX A: STATE MALAPPORTIONMENTS—1964

Statistical Measures Of "Malapportionment" In The Fifteen State Legislatures Held Unconstitutional By The United States Supreme Court, June 15 And June 22, 1964

State	Minimum Population theoretically able to control a majority of the seats		Population variance ratio	
	Senate	House	Senate	House
Alabama				
Existing apport.	25.1%	25.7%	41-1	16-1
67 Senator Amendmt.	19.4%	43.0%	59-1	4.7-1
Crawford-Webb Act	27.6%	37.0%	20-1	5-1
Colorado				
Existing apport. (Amendmt. No. 7)	33.2%	45.1%	3.6-1	1.7-1
Prior apport.	29.8%	32.1%	8-1	8-1
Delaware				
Existing apport. (1963 Amendmt.)	21.0%	28.0%	15-1	12-1
Prior apport.	22.0%	18.5%	15-1	35-1
Maryland				
Existing apport. (1962 revision of lower house)	14.1%	35.6%	32-1	6-1
Prior apport.	14.1%	24.7%	32-1	12-1
New York				
Existing apport	41.8%	34.7%	3.9-1	21-1
Projected apport. under revision due by 1966 (under state constit. standards)	38.1%	37.5%	2.6-1	12.7-1
Virginia	41.1%	40.5%	2.65-1	4.36-1
Connecticut	32.0%	12.0%	8.1-1	424.6-1
Florida	14.1%	22.9%	38.1-1	23.3-1
Idaho	16.6%	32.7%	102.2-1	17.0-1
Illinois	28.7%	39.9%	10.6-1	4.9-1
Iowa	35.2%	26.9%	8.9-1	16.8-1
Michigan	29.0%	44.0%	12.4-1	3.9-1
Ohio	41.0%	30.3%	1.9-1	9.4-1
Oklahoma	24.5%	29.5%	26.4-1	13.9-1
Washington	33.9%	35.3%	7.3-1	4.6-1

Source: The figures for the first six states listed, Alabama through Virginia, are taken from the Supreme Court opinions as reported in 377 U.S. 533 *et seq.* (1964). The figures for the last nine states, Connecticut through Washington, are taken from National Municipal League, *Compendium on Legislative Apportionment,* 1963 Supplemental Chart.

APPENDIX B: SUMMARY OF CENSUS DATA UNITS AVAILABLE FOR USE BY THE CONNECTICUT APPORTIONMENT BOARD

The total number of block groups/enumeration districts that the reapportionment board had to work with in reapportioning the Connecticut Legislature was 2746.* These areas broken down by population showing the following:

Population Size of Area	No. of Areas of This Size	Approx. % of Total No. of Areas
0-99	83	3
100-199	82	3
200-299	75	3
300-399	90	3
400-499	109	4
500-599	127	5
600-699	179	7
700-799	180	7
800-899	225	8
900-999	212	8
1000-1099	189	7
1100-1199	197	7
1200-1299	171	6
1300-1399	136	5
1400-1499	120	4
1500-1599	94	3
1600-1699	93	2
1700-1799	61	2
1800-1899	48	2
1900-1999	58	2
2000-2099	31	1
2100-2199	39	1
2200-2299	23	1
2300-2399	18	1
2400-2499	16	1
2500-2599	16	1
2600-Up	74	3

* This is approx. + or — 50

The Assembly district breakdown by deviation from the perfect sized district is as follows:

Pop. Deviation From Perfect Sized District	No. of Districts
0-99	21
100-199	12
200-299	24
300-399	23
400-499	15
500-599	19
600-699	19
700-799	18
	Total 151

The Senate district breakdown by deviation from the perfect sized district is as follows:

Pop. Deviation From Perfect Sized District	No. of Districts
0-99	6
100-199	2
200-299	5
300-399	6
400-499	4
500-599	3
600-699	6
700-799	3
	Total 36

Sources: The first tabulation above gives the census unit distribution from which the condensed summary in the Fact Stipulation (Single App., p. 131) was derived. The second two tabulations derive from the Census Certification of Senate and Assembly District Populations (Single App., 141). Both were prepared by James F. Collins.